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State Bar of Arizona Ethics Opinions

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State Bar of Arizona Ethics Opinions

91-05: Conflict of Interest; Imputed Disqualification 2/1991

Lawyer may not defend a client in criminal fraud proceedings when client's bookkeeper was defended by lawyer's partner in substantially related IRS tax assessment proceedings, and, the bookkeeper will appear as critical prosecution witness against the client.

FACTS

This opinion concerns a lawyer's obligation to a former client of his law firm. The lawyer, A, represents defendant D in a criminal proceeding presently pending in federal court. A partner in Ats law firm, lawyer P, formerly represented a witness, W, who will be appearing on behalf of the prosecution at the criminal trial.

The criminal charges against D arose out of several businesses operated by D during the late 1970's and early 1980's. During this time, D received numerous loans from a bank to finance his operations. By late 1982, D and his associates realized that the businesses were becoming increasingly unwieldy, and they approached the bank about a major restructuring. The bank agreed to participate in the restructuring, but withdrew after the president of the bank was killed in an automobile accident in March, 1983. With financing for the restructuring no longer available, D and his entities sought Chapter XI bankruptcy protection from creditors.

After a lengthy investigation, D and three of his associates were indicted by federal authorities on felony charges involving the operation of the businesses. The indictments charge that D and his co-defendants knew or had reason to know that various investors in their businesses would not receive the returns promised when they made their investment. D will contend at trial that the businesses had a legitimate source of financing from the bank which would have resulted in full payment to the investors had the restructuring gone forward as planned.

W was a bookkeeper for D and his business entities during the years involved in the indictment. W is knowledgeable about the internal workings of the entities, their financial health, and the financing relationship between D and the bank. W was an authorized signatory on most, if not all, of the bank accounts.

In 1985 and 1986, the Internal Revenue Service (IRS) began assessment proceedings against W for the unpaid payroll taxes owed by Dss business entities. The IRS alleged that W, as a check signer, was a controlling person within the relevant sections of the Internal Revenue Code. W retained A's partner, P, to represent her in the proceedings before the IRS. After P had presented W's defense – apparently arguing that she was nothing more than an employee acting under the direction of D – the IRS dropped the assessment. This dismissal apparently was unconditional. W did not enter into any agreements with the IRS to cooperate in any future investigations or criminal proceedings against D.

In 1989, three or four years after his partner had represented W in the IRS assessment proceeding, A was retained to represent D in defending against the criminal indictment. A's law firm ran a computerized conflicts check which did not identify the firm's previous representation of W. A proceeded to invest hundreds of hours in preparing D's defense to the indictment.

The government has announced its intention to use W as a critical prosecution witness against D in the upcoming criminal trial. The government has not revealed the specific testimony which it intends to elicit from W, and W has not submitted to an interview or deposition regarding her knowledge. A believes that W might be used as a foundation witness for numerous documents. She might also be asked to testify about the relationship between D and the bank.

On the basis of his partner's prior representation of W, the government has moved to disqualify A from representing D in the upcoming criminal trial. A has avowed at hearings on the motion, and has stated in communications with this committee, that he has not reviewed his firm's file regarding P's representation of W, nor has he discussed the representation with P or obtained any other information regarding communications between W and his firm. A has stated that he will not, in the future, obtain such information. A's client, D, has requested that A be permitted to continue representing him in the criminal proceeding. D has been informed of A's conflict of interest, and has agreed in open court that A may proceed with the defense without reviewing any information relating to W's prior representation by A's firm.

W objects to the representation. W has stated that she will not consent to her former law firm's representation of D at the criminal trial.

As one possible solution to the problem, the trial judge has appointed lawyer X, who is not associated with A's law firm, to "shadow" the defense of D and be prepared to take up that defense if A is disqualified. A has proposed that X be permitted to conduct the investigation and cross examination of W at trial, and has avowed that nobody from his law firm will discuss with x the firm's prior representation of W.

QUESTIONS

1. May A ethically continue to represent D over the objection of W, a prosecution witness in the criminal proceedings and a former client of A's law firm?

2. May A ethically conduct the cross examination of W concerning all aspects of her relationship with D and his business entities, questioning her motives and competency to testify? May A ethically comment on her testimony and demeanor in final summation to the jury?

3. Other than A's obvious obligation not to disclose privileged information, are there any ethical restrictions on A's examination of W which would not be present if W had not been a former client of A's law firm?

4. Does X's involvement in the preparation, investigation, and cross examination of W eliminate the potential ethical conflict of interest for A and his law firm?

ETHICAL RULES INVOLVED

ER 1.9. Conflict of Interest: Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

*****

ER 1.10. Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by ER 1.7, 1.8(c), 1.9 or 2.2.

*****

OPINION

ER 1.10(a), as applied to the facts here, provides that A may not represent D in the pending federal criminal proceeding if A's partner, P, would be prohibited by ER 1.9 from representing D in the same matter. We must therefore determine, initially, whether P would be prevented from representing D by the terms of ER 1.9(a).

ER 1.9(a) states that a lawyer who has formerly represented a client in a matter shall not thereafter "represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation. n Applied to the facts here, this means that lawyer P, who formerly represented W in the IRS assessment proceeding, shall not thereafter represent D in the same or a substantially related matter in which D's interests are materially adverse to those of W, unless W consents after consultation. W refuses to consent. We must therefore determine (a) whether the subsequent criminal proceeding against D is "the same or a substantially related matter," and (b) whether D's interests in the criminal proceeding are "materially adverse" to the interests of W.

Before answering these questions, a word should be said about the scope and intent of ER 1.9(a). The rule has been adopted "for the protection of clients." Comment to ER 1.9. It seeks to assure clients that their lawyers will not use confidential information against them in a subsequent proceeding. To accomplish this important objective, the rule takes a broad, prophylactic approach. Rather than merely prohibiting the lawyer from using confidential information against the former client, the rule prohibits the lawyer from even entering into a relationship where such misuse is possible. The former client is thus protected not only from the misuse of his confidences, but also from the possibility of such misuse.

> One commentator has identified the public purpose in this rule as follows:
>
> "There is a public interest in assuring every client that communications to a lawyer will not be used adversely in the lawyer's later work. Situations that create a realistic risk that that will occur are those in which the former-client conflict rules should require disqualification.
>
> "Courts sometimes speak in terms of the former client's being 'entitled to freedom from apprehension' that confidences will be revealed in a succeeding representation ... The other important interest to be protected is the public interest of assuring all clients that lawyers can be trusted not to elicit their confidential information and then turn it against their interests. Only in that way can the assurance of confidentiality serve the objective of encouraging full client disclosure to a trusted lawyer."

See C. Wolfram, Modern Legal Ethics, 360-361 (1986) (citation and footnote omitted).

The broad, preventive approach of ER 1.9(a) has been recognized by Arizona courts. In Foulke v. Knuck, 162 Ariz. 517, 784 P.2d 723 (App. 1989), the Court of Appeals noted that the rule establishes an "absolute prohibition" against employment that falls within its terms. 162 Ariz. at 521, 784 P.2d at 727. In response to a lawyer's argument that no confidences had been disclosed in the first representation so that no harm would result from the subsequent employment, the Court of Appeals emphasized that the rule does not require the client to prove that the lawyer will use client confidences adversely:

> "[The subsequent client's] first contention fails to recognize the mandatory nature of ER 1.9(a). The rule does not require that confidences and secrets be divulged in order for a conflict to exist or for disqualification to be proper. (citations omitted) Regardless of what was communicated during the representation of the former client, the rule prohibits subsequent representation of an individual whose interests are substantially adverse to those of a former client."

162 Ariz. at 522, 784 P.2d at 728.

This cautious approach is not new. When examining possible conflicts with former clients, the law has long presumed that client confidences were shared in the first representation. As this committee stated in 1981: ". . . if the attorney switches sides in the same case or a substantially related case, it is presumed that the former client communicated confidential information to the attorney." Opinion No. 81-29 at 4 (September 17, 1981).

> The Arizona Supreme Court recently recognized this presumption:
>
> "[T]he [substantial relationship] test itself is premised, at least in part, on the presumption that a lawyer who now wants to represent an interest adverse to a former client has received confidences of that former client, which he should not be allowed to use now against the former client. The majority of courts that have considered the issue have held that the presumption that a lawyer received such confidences may not be rebutted."

Matter of Ockrassa, ____ Ariz. ____, 799 P.2d 1350, 1352 (1990), quoting ABA/BNA Lawyers' Manual on Professional Conduct, p.51:201 (1987).

The inquiring lawyer in this case has not attempted to rebut the presumption that W conveyed confidential information to P during the tax assessment proceeding. For purposes of this opinion, accordingly, we presume that W communicated such information to P.

With this background in mind, we will now determine whether the present criminal proceeding is "the same or a substantially related matter," and whether D's interests in that proceeding are "materially adverse" to W's interests. We address these issues separately.

1. Substantial Relationship

The current criminal proceeding and the former IRS assessment proceeding cannot be characterized as "the same" action. Both arose out of the same businesses and financial difficulties, but the objectives and parties are different: the IRS assessment proceeding sought to recover unpaid payroll taxes; the criminal prosecution, by contrast, seeks to establish D's criminal liability. If ER 1.9(a) applies to these facts, therefore, it must do so because the two matters are "substantially related" within the meaning of ER 1.9(a).

The comment to ER 1.9 provides little guidance for identifying substantially related matters. The Comment states only that the "scope of a 'matter' for purposes of ER 1.9 (a) may depend on the facts of a particular situation or transaction." Examining the facts before us, we conclude that the matters are substantially related.

The IRS assessment proceeding against W, and her testimony in the criminal prosecution, both arise out of her previous employment by D, her thorough involvement in D's finances, and the information she acquired as a result of that position. Both involve W's knowledge of D's banking relationship. In addition to this common business background, both proceedings arise out of the series of events that led ultimately to D's business failure. Moreover, it is quite possible that the defense asserted in the IRS assessment proceeding – that W was acting under the direction of D at all times – will be relevant during W's cross examination in the pending criminal proceeding. To the extent that D's lawyers seek to attack W's actions as an employee, or to establish her culpability for the charges against D in the indictment, W undoubtedly will respond by asserting D's close supervision of her actions. We thus find a close factual bond between the prior assessment proceeding and the pending criminal case. Matters so factually related are, in our view, "substantially related," within the meaning of ER 1.9 (a).

The Arizona Supreme Court discussed the scope of the "substantially related" requirement in Alexander v. Superior Court, 141 Ariz. 157, 685 P.2d 1309 (1984). Alexander concerned a motion to disqualify a lawyer for representing interests adverse to those of his former clients. The lawyer targeted in the disqualification motion previously had represented several tax shelter investors in proceedings against the Internal Revenue Service. The IRS had disallowed most of the deductions claimed by the investors, and the lawyer sought to obtain a reversal by proceedings in the Tax Court. 141 Ariz. at 159, 685 P.2d at 1311.

Sometime later, the lawyer was asked to represent the principals involved in the tax shelter investments in defending against civil securities fraud charges brought by the State of Arizona. When the lawyer appeared as counsel for the principals, the State moved for disqualification, claiming that his prior representation of the investors placed him directly in conflict with his current representation of the principals in the securities fraud action. 141 Ariz. at 160, 685 P.2d at 1312. The court held that "[t]he present litigation is, indeed, 'substantially related' to the Tax Court litigation," 141 Ariz. at 164, 685 P. 2d at 1316, but declined to disqualify the lawyer after finding that the only investor who had made a confidential communication to the lawyer had made it public. Id.[1]

We find Alexander to be closely analogous to our facts. The lawyer previously represented investors in proceedings against the IRS, just as P represented W in proceedings before the IRS in this case. The lawyer then represented the principals involved in the tax shelters in defending against various securities fraud allegations, just as P's firm now represents W's employer in defending against criminal fraud charges. If the securities fraud action in Alexander was "substantially related" to the preceding Tax Court litigation, we believe the criminal fraud action in this case is "substantially related" to the preceding tax assessment matter. In both cases, the tax proceedings and subsequent fraud actions arose out of a common nucleus of facts. That factual connection is sufficient, under Alexander, to satisfy the "substantially related" test.

This conclusion is strengthened by the Supreme Court's decision in Ockrassa. The lawyer complained against in Ockrassa was found in State Bar disciplinary proceedings to have violated ER 1.9(a). The lawyer previously had defended a Mr. Otto in three criminal DUI cases. Otto was convicted in each case. Three years later, while employed as a deputy county attorney, Ockrassa prosecuted Mr. Otto for two additional crimes (at least one of which was also a DUI case). The criminal allegations in these later proceedings identified the previous DUI convictions as offenses within the preceding 60 months, making Otto eligible for more severe criminal penalties. ____ Ariz. At ____, 799 P. 2d at 1350.

Although the previous DUI convictions were factually and legally unrelated to the subsequent criminal proceedings, the Supreme Court found that all were "substantially related" within the meaning of ER 1.9(a). The Court identified "a substantial danger that confidential information revealed in the course of the attorney/client relationship would be used against Mr. Otto by respondent, his former attorney." ____ Ariz. At ____, 799 P.2d at 1352. Because confidences might have been revealed to the lawyer in the earlier proceedings that could be relevant to the later cases, the Court found the two sets of proceedings to be "substantially related." Id.

In this case, it is entirely possible that W conveyed confidences to P that could be relevant to the defense of D in the criminal proceeding. The facts underlying the IRS assessment proceeding underlie the criminal prosecution as well. We thus find in this case the same danger identified in Ockrassa -- confidential information revealed by the former client during the previous representation which could be used to the client's disadvantage in the current proceeding. Under Ockrassa, the two representations are "substantially related" within the meaning of ER 1.9(a).[2]

2. Materially Adverse

Having concluded that the matters involved in this inquiry are substantially related, we must now determine whether D's interests in the criminal proceeding are "materially adverse" to the interests of W. We find that they are. W will appear as a key prosecution witness in the criminal trial of D. D's objective at trial will be to discredit W's testimony in any way feasible, including the possible suggestion of W's own criminal culpability. It seems apparent that the interests of W and D in the criminal proceeding are thus materially adverse.

This conclusion is supported by the Arizona Supreme Court's decision in Rodriguez v. State, 129 Ariz. 67, 628 P.2d 950 (1981). The lawyer in Rodriguez, a member of the Maricopa County Public Defender's Office, was defending Rodriguez against an indictment charging 15 counts of sexual assault and related crimes. In order to strengthen his defense of mistaken identity, the lawyer decided to call Frank Silva as a witness at trial. Silva, who was similar in appearance to Rodriguez, was also being represented by the Public Defender's Office, but in entirely unrelated sexual assault matters. The office withdrew from representation of Silva, and requested permission to withdraw from representation of Rodriguez so that Rodriquez's defense lawyers could vigorously examine Silva, a former client of the Public Defender's Office, at trial. 129 Ariz. at 69, 628 P.2d at 952.

Applying the former ethical rules of the Code of Professional Responsibility, the Supreme Court held that the Public Defender's Office should have been permitted to withdraw because it would be ethically impermissible for that office to defend one client by calling a former client to testify at the present client's criminal trial. In the course of this decision, the Court noted the adversity that could arise at Rodriguez's trial. "If the Public Defender's Office continues to represent Rodriguez and a confrontation with Silva developed at Rodriguez's trial, it is possible, even probable, that it would be to Silva's disadvantage." 129 Ariz. at 74, 628 P.2d at 957. We likewise conclude that a confrontation between D and W at D's criminal trial might well be to W's disadvantage. As noted above, D's lawyer, has every incentive, indeed every obligation, to attack and discredit w's testimony.

The relationship between a prosecution witness and the criminal defendant was found to be "materially adverse" within the meaning of ER 1.9(a) in United States v. Cheshire, 707 F. Supp. 235 (M.D. La. 1989). The court in Cheshire considered facts almost identical to those before us. The defense lawyer, Anthony Marabella, represented one Dyer in a federal criminal prosecution. Mr. Marabella previously had represented Reginald Jones in a related criminal matter. Mr. Jones was designated to testify as a key prosecution witness at Dyer's trial. Id. At 236-237. The court wasted little time in concluding that the interests of Jones, the witness, were materially adverse to the interests of Dyer, the defendant:

> "There is no question but that the interests of Mr. Marabella's present client, Mr. Dyer, arc materially adverse to the interests of his former client, Mr. Jones, because it is largely upon the basis of Mr. Jones' testimony that the government hopes to convict Mr. Dyer."

Id. at 239. We likewise find that the interests of W, the former client of the inquiring lawyer's law firm, are materially adverse to the interests of D, the law firm's present client.

Having concluded that the current criminal trial is substantially related to the IRS tax assessment proceeding against W, and that D's interests in the present criminal proceeding are materially adverse to the interests of W, we conclude that ER 1.9(a) would prohibit lawyer P from representing D in the current criminal proceeding. As the Arizona Court of Appeals recognized in Foulke, the rule establishes an "absolute prohibition against such representation." 162 Ariz. at 521, 784 P.2d at 727.

If P would be prohibited from representing D in the criminal proceeding, can his partner, A, undertake and continue the representation? We think not. Like ER 1.9(a), ER 1.10(a) is absolute. Its language admits of no exceptions. The rule states plainly: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by ER 1.7, 1.8(c), 1.9 or 2.2." Because lawyer P would be disqualified from representing D by ER 1.9, lawyer A, his partner, is likewise disqualified. It is irrelevant that A has never discussed the prior representation with P, and has never reviewed his law firm's files regarding W. Possession of such knowledge is not a prerequisite to the imputed disqualification found in ER 1.10(a). Like ER 1.9 (a), the rule is prophylactic. It is designed to prevent even the possibility of misusing confidential information.

The disqualification of lawyer A is supported by the Cheshire case discussed above. As noted, Cheshire presents a remarkably similar factual situation. Lawyer Marabella was disqualified from representing defendant Dyer because he previously had represented Jones, a key prosecution witness against Dyer. In addition, an associate of Mr. Marabella was representing defendant Cheshire in the same criminal proceeding. The court held that Marabella's previous representation of Jones disqualified not only Marabella, but also his associate. This was true even though the associate had "no actual knowledge concerning the case of Mr. Jones" and "performed' no legal services on his behalf." 707 F. Supp. at 240. The court found the prohibition of 1.10(a) to be absolute:

> "If one concludes, as I have here, that these lawyers constitute a 'law firm' within the meaning of ABA Rule 1.10, then 'none of them' may represent a new client when any of them would be prohibited from representing that client under ABA Rule 1.9. The disqualification applies without regard to actual information or knowledge or participation of the associate."

Id. at 241. Lawyer A readily admits that he and P are members of the same law firm, and have been partners since before P represented W. The disqualification mandated by ER 1.10(a) applies to lawyer A.

We thus provide the following answers to the first three questions posed by the inquiring lawyer: (1) lawyer A may not ethically continue to represent D over the objection of W, a witness in the prosecution against D and a former client of A's law firm; (2) lawyer A may not, with ethical propriety, conduct the cross examination of W, question her motives and competency to testify, and comment on her testimony and demeanor in final summation to the jury; and (3) in response to the question whether there are any restrictions on examination of W other than A's obvious obligation not to disclose privileged information, we respond that there are indeed additional restrictions. There is a complete prohibition. A may not represent D in the current criminal proceeding.

This leaves the fourth and final question: Does the involvement of lawyer X eliminate the conflict of interest for A and his law firm? If lawyer X is not part of A's firm, and will conduct an independent investigation and cross examination of W, may A ethically continue the representation? We think not.

One must remember that ER 1.9(a) is designed to protect W. It is intended to give W the assurance that her lawyer-client confidences will not be used against her. No matter how carefully X and A avoid discussing W or her prior representation by A's firm, they necessarily will engage in many communications about the criminal defense of D. They will have to coordinate their facts, coordinate their theories, coordinate their arguments. W will thus be confronted with the uncomfortable fact that her former lawyers are cooperating closely with the lawyer who will cross examine her at trial. ER 1.9 (a) is designed to prevent precisely such discomfort from arising. W is "entitled to freedom from apprehension' that confidences will be revealed in a succeeding representation." Wolfram, op. cit., at 360.

Again, our conclusion is supported by Cheshire. When lawyer Marabella was confronted with the prospect of cross examining his former client who would be appearing as a prosecution witness, he too struck upon the possible solution of appointing independent counsel. Mr. Marabella, like lawyer A in this case, recommended that such counsel be appointed to investigate and cross examine his former client. The court in Cheshire rejected the suggestion:

> "Mr. Marabella acknowledges that he could not, under the canons of ethics, conduct the cross examination of his former client. His proposed solution – having a separate lawyer cross examine Mr. Jones – does not eliminate the conflict. At the very least, in order to represent his present client, Mr. Marabella must be completely free and unfettered to analyze, characterize and repudiate the testimony of his former client in closing argument. Moreover, this judge views it as an almost impossible task for a lawyer to participate throughout the course of a trial but not suggest a single question or style for cross examination of the most important witness against his present client."

707 F. Supp. at 240. Like the court in Cheshire, we do not believe that the appointment of independent counsel (X) to cross examine W eliminates the interest of W which ER 1.9(a) is designed to protect. We therefore conclude that such a solution will not obviate A's disqualification under the rule.

A has emphasized in his inquiry that his client, D, has consented to his continued representation. Although such consent might remove the ethical impediment A might otherwise face under ER 1.7(b), it does not eliminate the impediment of ER 1.9(a). It is the consent of W, not the consent of D, that A must obtain to avoid the strictures of ER 1.9(a). W has refused to give that consent.

We reach no conclusion on the legal question of whether the court should disqualify A in response to the government's motion. Our responsibility is that of giving ethical advice, not legal advice. On the basis of the discussion set forth above, we conclude that ER 1.9(a) and ER 1.10(a) require that A and all other members of his law firm refrain from representing D in the current criminal proceeding.

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[1] The use of the "substantial relationship" test to resolve claimed conflicts of interest between a lawyer and a former client has been common since T.C. Theatre Corp. v. Warner Brothers Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953). Indeed, ER 1.9 (a) adopted the "substantial relationship" and "materially adverse" tests first set forth in T.C. Theatre. See ABA/BNA Lawyers' Manual on Professional Conduct, p. 51:204 (1987). Although the Arizona Supreme Court's Alexander decision was rendered before ER 1.9(a) had been adopted in Arizona, the opinion follows the substantial

relationship test established in T.C. Theatre. See Alexander, 141 Ariz. at 163-164, 685 P.2d at 1315-1316. The substantial relationship analysis found in Alexander is, thus, the same as that required by ER 1.9(a), and provides guidance for our conclusions in this opinion.

[2] Although courts apply different tests to determine whether matters are "substantially related," all seem to give this term a fairly broad reading. In this case, we are presented with identical facts underlying the past IRS assessment and the current criminal proceeding. Many courts require only that the factual contexts of the two representations be similar or related. See, e. g., Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980); Smith v. Whatcott, 757 F.2d 1098, 1100 (10th Cir. 1985). Some of these courts, like the Arizona Supreme Court in Ockrassa, also emphasize the likelihood that confidences were exchanged between the former client and the lawyer. "If there is a reasonable probability that confidences were disclosed which could be used against the client in the later, adverse representation, a substantial relation between the two cases is presumed." Trone, 621 F.2d at 998. See also Kevlic v. Goldstein 724 F.2d 844, 851 (1st Cir. 1984). We find that the facts here present a substantial relationship no matter which of these tests is used.

State Bar of Arizona Ethics Opinions

10-02: Communication with Clients; Departing Lawyer; Law Firm's Obligations

3/2010

When a lawyer's employment with a firm is terminated, both the firm and the departing lawyer have ethical obligations to notify affected clients, avoid prejudice to those clients, and share information as necessary to facilitate continued representation and avoid conflicts. These ethical obligations can best be satisfied through cooperation and planning for any departure.

FACTS

Lawyers who are employed by law firms may be terminated or may choose to terminate their own employment for various reasons. This opinion discusses the ethical obligations of the firm and the departing lawyer in connection with that lawyer's separation from the firm. Given the importance of this subject, the Committee on the Rules of Professional Conduct has determined that it is appropriate to issue a *sua sponte* opinion for the guidance of lawyers in Arizona.

QUESTION PRESENTED

When a lawyer's employment with a law firm is terminated for any reason, whether voluntarily or involuntarily, what are the ethical obligations of the law firm and the departing lawyer with regard to the client matters on which the departing lawyer is working or has worked while employed at the firm?

APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT ("ER __")

ER 1.1 Competence

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

ER 1.3 Diligence

> A lawyer shall act with reasonable diligence and promptness in representing a client.

ER 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in ER 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rule of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

. . . .

ER 1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) the degree of risk assumed by the lawyer.

. . . .

ER 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d) or ER 3.3 (a)(3).

. . . .

ER 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

> (1) whose interests are materially adverse to that person; and
> (2) about whom the lawyer had acquired information protected by ERs 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter shall not thereafter:

> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

. . . .

Comment

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the Rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today may lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by ERs 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See ER 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files or all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See ERs 1.6 and 1.9(c).

. . . .

ER 1.10 Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by ERs 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interest materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
(2) any lawyer remaining in the firm has information protected by ERs 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in ER 1.7.

(d) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under ER 1.9 unless:

(1) the matter does not involve a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role;
(2) the personally disqualified lawyer is timely screened from any participation in the matter and is appointed no part of the fee therefrom; and
(3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

. . . .

ER 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;
(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

. . .

(7) other good cause for withdrawal exists.

(c) A lawyer shall comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering documents and property to which the client is entitled and refunding any advance payment of a fee that has not been earned. Upon the client's request, the lawyer shall provide the client with all of the client's documents, and all documents reflecting work performed for the client. The lawyer may retain documents reflecting work performed for the client to the extent permitted by other law only if retaining them would not prejudice the client's rights.

ER 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ER 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

ER 5.6 Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

ER 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

. . . .

RELEVANT ETHICS OPINIONS

Ariz. Ethics Ops. 09-01, 08-02, 99-14; ABA Formal Op. 99-414

OPINION

Lawyers who are employed by law firms may be terminated or may choose to terminate their own employment for various reasons. When a lawyer's employment with a firm is terminated by either the lawyer or the employer, both parties may wish to end their association quickly and with a minimum of post-termination contact. When a lawyer leaves the employment of a law firm, however, both the lawyer and the firm he or she is leaving have ethical obligations to the firm's clients and must work together as necessary to ensure that the lawyer's departure does not prejudice any of the clients for whom that lawyer was working.

Informing the Client and the Client's Right to Choose Counsel

In Op. 99-14, we discussed some of the obligations of a departing lawyer with regard to his or her then-current clients. While that opinion was primarily focused on the extent to which a voluntarily departing lawyer *could* reach out to current clients about continuing to represent them after his or her departure, the opinion did make clear that, when a lawyer who is working on a client matter leaves a firm, the lawyer "has an ethical obligation, under ER 1.4, to advise his or her clients of the impending departure, so that the clients may decide who they want to continue the representation." Ariz. Ethics Op. 99-14.

This duty to inform the client of a lawyer's departure arises because the client, not the lawyer or law firm, chooses which lawyer will continue to represent the client. *See* Ariz. Ethics Op. 09-01 (discussing client's right to choose lawyer in context of agreements restricting departing lawyer's practice). In the words of the American Bar Association, which has reached the same conclusion, "informing the client of the lawyer's departure in a timely manner is critical to allowing the client to decide who will represent him." [1] ABA Formal Op. 99-414. Even if the firm or the lawyer believes it is unlikely that the client would choose to retain new counsel because of the lawyer's departure, the client nonetheless has the right to make that decision. ER 1.4 requires that the lawyer keep the client reasonably informed of both the status of the matter and any information "reasonably necessary to permit the client to make informed decisions regarding the representation." [2] The firm may not take any actions that impedes or prevents the departing lawyer's compliance with ER 1.4 or any other Ethical Rule. *See* ER 8.4(a) (defining professional misconduct to include inducing another's violation of the Rules of Professional Conduct).

This analysis assumes that the departing lawyer had a significant enough role in the representation of the client that informing the client would be reasonable and necessary. The departing lawyer may have been only one of a many-member team of lawyers handling a matter or may have done only a very small amount of work on a matter (such as a few hours of legal research). Whether the client needs to be informed of the lawyer's departure and reminded of the client's right to choose counsel depends on whether, viewed from the perspective of the client, the client's decision about who should continue the representation might depend on the continued involvement of the departing lawyer. *Cf.* ABA Formal Op. 99-414 (requirement of notification applies to "lawyer who is responsible for the client's representation or who plays a principal role in the law firm's delivery of legal services currently in a matter"). This analysis will not necessarily depend on the status or title of the departing lawyer, or even the amount of time devoted to the matter, but rather on the degree of that lawyer's substantive involvement in the case. In order to protect the client's interest, it is advisable to resolve close cases in favor of informing the client.

Avoiding Prejudice to the Client from Departure of the Lawyer

In addition to timely informing the client of the lawyer's departure, the firm and the lawyer must both act as necessary to ensure that the client is not prejudiced by the lawyer's departure. ER 1.16(d) requires that whenever a lawyer withdraws as counsel, the lawyer "shall take steps to the extent reasonably practicable to protect a client's interests."

First, before terminating a lawyer, the law firm must consider the possible effect of the termination on the client. ER 1.16(b)(1) permits voluntary withdrawal only if it "can be accomplished without material adverse effect on the interests of the client." ER 1.16(b)(1). To comply with this rule when terminating a lawyer, the firm therefore must take steps to avoid prejudice to the client, including by considering the work being done by the lawyer and the status of the matters on which the lawyer is working, and developing plans for ensuring the continuity of work for the client after termination of the lawyer. *See* ER 5.1 (ethical responsibilities of supervising and managing law firms).

Once the decision to terminate the working relationship has been made, the law firm and the departing lawyer must both take steps to ensure that the departing lawyer's clients will be competently and diligently represented pursuant to ERs 1.3 and 1.4. Unlike the duty to inform the client of the lawyer's departure, which may not be required for clients with whom the departing lawyer has had only insubstantial contact, the duty to share information necessary for competent and diligent representation exists in every matter. Thus, even if the departing lawyer did only a few hours of research for the client, he or she must ensure that the work product generated during that research is left with the firm in a form that will be usable for the continued representation of the client. *See also* Ariz. Ethics Ops. 08-02 and 98-07 (regarding client's right to the contents of the lawyer's file). Regardless whether the client will stay with the firm, follow the departing lawyer, or retain a third-party lawyer, further representation of that client will require access to information about the status of the matter and the proceedings to date, notes reflecting the personal knowledge of the lawyers who will no longer be involved with the client matter, and complete information about any pending deadlines. The law firm and the departing lawyer are both obligated to the client under ERs 1.3 and 1.4, regardless of the status of their contractual employment relationship. They must cooperate to ensure that all obligations to the client are fulfilled. If the law firm and departing lawyer cannot or will not

cooperate, then each must take the steps necessary to protect the client's interests without impeding or preventing the fulfillment of the other's obligations. *See generally* ERs 5.1 and 5.2 (discussing the independent ethical obligations of both supervisory and subordinate lawyers in a firm setting).

The lawyer or firm that undertakes the ongoing representation of the client also should be cautious regarding the reasonableness of fees charged during the transition. New lawyers may need to be brought up to speed on the client's matter, or lawyers may need to spend time documenting their recollection of the matter to date. This work should only be charged to the client to the extent that doing so is consistent with the lawyer's obligations under ER 1.5 to charge a fee that is reasonable for the representation of the client.

Ensuring that Both Parties Have Sufficient Information to Fulfill Ethical Responsibilities

Both the law firm and the departing lawyer have ongoing obligations regarding their former shared clients. The duty to maintain confidentiality outlasts the lawyer-client relationship. ER 1.9(c) and ER 1.9, comment 7. Both the law firm and the departing lawyer also must avoid impermissible conflicts of interest arising from the representation of those clients under ERs 1.7 and 1.9, and any firm that the departing lawyer joins also must comply with ER 1.10(d), including timely screening of the lawyer to avoid impermissible conflicts. [3] To the extent that the firm must share information with the departing lawyer about all of the clients and matters on which that lawyer worked to prevent impermissible conflicts, the law firm is obligated by ER 8.4(a) to do so, lest it induce misconduct by denying the departing lawyer information necessary to comply with the Rules.

CONCLUSION

Termination of a lawyer's employment or partnership with a firm, for whatever reason, requires the lawyer and firm involved to (1) provide timely notice to affected clients to permit those clients to make informed decisions regarding their continued representation, (2) work to ensure the continued competent and diligent representation of the client, (3) avoid charging excessive fees in connection with any work done as a result of the departure and related transitions, and (4) share information as necessary to permit the firm, the lawyer, and his or her future law firm to comply with their duties to avoid conflicts. Neither the lawyer nor the firm may impede or prevent the other's fulfillment of any ethical obligations or duties to a client or the court.

Both the departing lawyer and the firm remain obligated to keep the client's confidences and avoid impermissible conflicts, and should cooperate to facilitate the continued competent and diligent representation of clients.

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[1] In the case of a lawyer who has been discharged for misconduct amounting to an ethics violation

that triggers the law firm's reporting obligation under ER 8.3, the firm may also have the duty to inform the client that it has reported the lawyer to the bar. Those obligations are outside the scope of this opinion.

[2] This same obligation may arise when changes in the staffing of a case occur for other reasons, such as a medical or disability leave or the reassignment of a lawyer to other cases because of workload issues. As in the case of a departing lawyer, the touchstone is reasonableness – does the client reasonably need to be informed of the change in staffing because the client may need or want to make decisions or take actions as a result of that change?

[3] For additional discussion of conflicts involving lawyers moving between firms, *see* Ariz. Ethics Ops. 94-06, 95-04, and 95-06.

State Bar of Arizona Ethics Opinions

05-04: Electronic Storage; Confidentiality 7/2005

ER's 1.6 and 1.1 require that an attorney act competently to safeguard client information and confidences. It is not unethical to store such electronic information on computer systems whether or not those same systems are used to connect to the internet. However, to comply with these ethical rules as they relate to the client's electronic files or communications, an attorney or law firm is obligated to take competent and reasonable steps to assure that the client's confidences are not disclosed to third parties through theft or inadvertence. In addition, an attorney or law firm is obligated to take reasonable and competent steps to assure that the client's electronic information is not lost or destroyed. In order to do that, an attorney must be competent to evaluate the nature of the potential threat to client electronic files and to evaluate and deploy appropriate computer hardware and software to accomplish that end. An attorney who lacks or cannot reasonably obtain that competence is ethically required to retain an expert consultant who does have such competence.

FACTS[1]

The Inquiring Attorney has sought guidance from the Committee regarding the steps the lawyer's firm must take to safeguard electronic client information from Internet hacking and viruses. The Inquiring Attorney's firm has, until recently, kept documents which include confidential client information in electronic form on a computer system which is accessible only from computers within the law firm itself. Although the law firm had access to the internet, that access was through a separate computer system. Neither the computer system on which the client information was stored nor any computer which could access that information was ever connected to the internet.

The Inquiring Attorney's firm now wishes to change that system and allow attorneys and staff to access the internet through the same computers they use to access the client information. Though the Inquiring Attorney does not specifically state this, it is assumed that firm attorneys and other employees will be able to access the client documents remotely. That is, an attorney or other employee may access this information from a computer outside the physical offices of the firm. Such access would be through the internet.

QUESTION PRESENTED

How do we protect the confidentiality and integrity of client information while continuing to increase reliance on internet for research, filings, communication, and storage of documents?

RELEVANT ETHICAL RULES

ER 1.1 Competence:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

ER 1.6(a) Confidentiality of Information:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c), or (d), or ER 3.3(a)(3).

ER 5.1(a) Responsibilities of Partners. Managers, and Supervisory Lawyers:

> (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

ER 5.3(a) and (b) Responsibilities Regarding Nonlawyer Assistants:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
>
> (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
>
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; . . .

OPINION

It is clear that a lawyer has an ethical obligation to protect the confidences entrusted by clients. Comment 19 to ER 1.6 makes this plain:

> [19] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See ERs 1.1, 5.1 and 5.3.

Thus, the short answer to the Inquiring Attorney's inquiry is that a lawyer must act in a competent and reasonable manner to assure that the information in the firm's computer system is not disclosed through inadvertence or unauthorized action. Of course, this syllogism does not really answer the question.

The State Bar of Arizona's Committee on the Rules of Professional Conduct (the "Committee") has not directly addressed this issue. However, in 1997, the Committee addressed the related question of whether an attorney may ethically communicate with clients via e-mail regarding confidential matters. There, the Committee stated that a lawyer may communicate with clients via e-mail. Op. 97-04 (April 7, 1997). However, the Committee warned that a lawyer may want to encrypt the e-mail or use passwords or other electronic measures to guard against inadvertent disclosure. The Committee noted that some courts have deemed e-mail not to be a "sealed" mode of transmission and, thus, subject to unauthorized interception. See, e.g., American Civil Liberties Union v. Reno, 929 F.Supp. 824, 834 (E.D.Pa. 1996). The Committee also noted that this recommendation was consistent with the Committee's prior ruling in Op. 95-11 where lawyers were cautioned against discussing "sensitive information" via cellular telephone because of concerns that such discussion may be intercepted. Importantly, the Committee noted that unauthorized interception of cellular telephone calls would be illegal - presumably violating a host of Arizona and Federal laws regarding wire-tapping.

In neither opinion did the Committee deem that the conduct in question was unethical, only that a lawyer should be cautious and take necessary precautions to safeguard client information.

The same reasoning can and should be applied to the questions posed by the Inquiring Attorney. However, it is also important to note that both the law and the practice have changed markedly since 1997. Obviously, the use of e-mail and cellular telephones has significantly expanded since 1997. Moreover, the use of the internet in businesses of all kinds - including the practice of law - has exploded. Not only do more lawyers now use computers than ever before, they use them in ways not imagined ten years ago. It is common to do legal research through the internet - indeed many law firms are abandoning most, if not all, of their physical libraries in favor of on-line resources. It is common for attorneys to exchange correspondence, documents and other information via e-mail and other electronic modes of communication which utilize the internet. Electronic filing in bankruptcy court, for example, requires an internet connection.

Areas of the law relating to client confidences have also changed in recent years. The recent evolution of the law relating to waiver of the attorney-client and work product privileges is instructive. While a lawyer's ethical obligations to safeguard the client's confidences go beyond just protecting privileged material, the reasoning of courts addressing these provisions is most helpful in setting a minimum level of conduct.

The Inquiring Attorney's concerns focuses on what a lawyer must do to protect electronic files from being (1) stolen, (2) inadvertently disclosed to others, and (3) lost or destroyed. All of those scenarios have been extensively discussed by the courts in the context of waiver of the attorney-client or work product privilege.

Stolen Electronic Information - the Purloined Letter.

The Inquiring Attorney's first concern was that electronic information stored on computers which are also used to access the internet may be subject to "hackers" who wish to steal the client's information. It does not matter whether the hacker's motive is to obtain information for sale or for the hacker's own mysteriously prurient interests.

The courts' treatment of document theft have changed in recent years. Until the late twentieth century, the common rule was that any document, otherwise protected from disclosure by the attorney-client or work product privilege, would lose that privilege if it was disclosed even when such disclosure was caused by theft. This rule, sometimes referred to by commentators as the "Wigmore Rule," has been largely abandoned.

In *Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254 (N.D.Ill. 1981), the District Court for the Northern District of Illinois addressed the Wigmore rule and noted the modern trend away from that rule. There, plaintiff routinely searched the trash dumpster located in the parking lot behind the defendant's offices. In the course of these searches, plaintiff discovered drafts of letters and other information which was clearly protected by the attorney-client privilege. Defendants sought to have such documents returned and to prohibit use of those documents at trial.

The court noted that the rule adopted by Wigmore was simple and precise.

> . . . [T]he traditional rule effectively presumed that if the parties to a communication intended it to be and remain confidential, they could protect its confidentiality. Accordingly, even where the eavesdropper acted surreptitiously or the communication was stolen, and the parties reasonably expected that it was confidential, the privilege was considered destroyed.

91 FRD at 258 n.3.

However, the court also noted that the modern rule was less draconian and was based upon the notes of the Advisory Commission to Proposed Rule 503, Federal Rules of Evidence. The Commission noted:

> . . . Unless intent to disclose [an otherwise privileged communication] is apparent, the attorney-client communication is confidential. Taking or failing to take precautions may be considered as bearing on intent. . . . Substantial authority has in the past allowed the eavesdropper to testify to overheard privileged conversations and has admitted intercepted privileged letters. Today, the evolution of more sophisticated techniques of eavesdropping and interception calls for abandonment of this position. The [proposed] rule accordingly adopts a policy of protection against these kinds of invasion of the privilege.

91 F.R.D. at 260 n. 4.

However, this "modern rule" does not wholly relieve the attorney or his client from taking precautions against theft and disclosure. The court held that preservation of the privilege does not "in any way reduce the client's need to take all possible precautions to insure confidentiality." 91 F.R.D. at 260 (quoting *2 Weinstein's Evidence*, 503(b)(2)).

Thus, the modern rule is that precautions must be taken to prevent the theft of confidential communications to preserve the privilege.

Inadvertent Disclosure

Instances where privileged information has been stolen are relative rare. More common is the predicament where a lawyer has inadvertently disclosed otherwise privileged information. The Eighth Circuit Court of Appeals has summarized the three approaches generally taken in analyzing the effect of inadvertent disclosure. First, it notes what it refers to as the "lenient" approach.

> Under the lenient approach, attorney-client privilege must be knowingly waived. Here the determination of inadvertence is the end of the analysis. The attorney-client privilege exists for the benefit of the client and cannot be waived except by an intentional and knowing relinquishment.

Gray v. Bicknell, 86 F.3d 1472, 1483 (8th Cir. 1996) (citing cases from the Southern District of Florida and the Northern District of Illinois).

The Eighth Circuit rejected that rule. A privileged document must be confidential to retain its privilege but, the court stated, "under this test, the lack of confidentiality becomes meaningless. . . ." Id.

The court also rejected what it called the "strict" test.

> . . . Under the strict test, any document produced, either intentionally or otherwise, loses its privileged status with the possible exception of situations where all precautions were taken. Once waiver has occurred, it extends "to all other communications relating to the same subject matter."

Id. at 1483 (citing cases from the DC and First Circuits).

Noting that the strict test has "some appeal" because it makes attorneys and clients accountable for their own carelessness, the Eighth Circuit rejected it "because of its pronounced lack of flexibility and its significant intrusion on the attorney-client relationship." Id.

Ultimately, the Eighth Circuit adopted what it called the "middle-of-the-road" test, sometimes referred to as the "Hydraflow test" after *Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626 (WDNY 1993). This test sets out a five-part analysis to determine whether inadvertently disclosed documents retain their privileged status.

> . . . These considerations are: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosures, (4) the promptness of measures taken to rectify the disclosure, and (5) whether the overriding interest of justice would be served by relieving the party of its error.

Id. at 1483-84.

While no Arizona State court has directly addressed these issues, the Arizona Federal District Court has. In *Resolution Trust Corporation v. Dean*, 813 F.Supp. 1426 (D. Ariz. 1993), a senior attorney representing the Resolution Trust Corporation ("RTC") prepared an internal memorandum discussing the RTC's investigation of certain claims it was pursuing against J. Fife Symington relating to the Camelback Esplanade project in Phoenix, Arizona. The memorandum (called the "ATS Memo") discussed possible claims against Symington, possible defenses to such claims, the probability of success on those claims and defenses, the cost of proceeding and the likelihood of recovery. The ATS Memo was deemed by the court to be covered by the attorney-client privilege.

Unfortunately, all or part of the ATS Memo was "leaked" to the press. Defendants sought production of the entire document, the RTC refused, and a motion to compel production followed. The court's analysis followed and expressly relied upon two different cases, *In re Grand Jury Proceedings Involving Berkley & Co.*, 466 F.Supp. 863 (D. Minn. 1979) ("Berkley") and *In re Dayco Corp. Derivative Securities Litigation*, 102 F.R.D. 468 (S.D. Ohio 1984) ("Dayco"). The RTC claimed that, because it had taken extensive precautions against disclosure of the ATS Memo and because it could not determine how the document was leaked to the press, such disclosure was unauthorized and amounted to a crime.

The Arizona District Court noted that, in *Berkley*, the Minnesota Court held that, "to the extent the documents can be viewed as stolen, they should not lose the protection of the attorney-client privilege." *RTC v. Dean*, at 1429. It also noted that, before reaching that conclusion, the Minnesota Court conducted an in camera review of the documents to determine the privilege status and ordered Berkley to "provide information as to the manner in which it maintains its records." Id.

Defendants argued that, unlike the situation in *Berkley*, there was no evidence that the ATS Memo had been stolen. The Arizona court found this distinction to be without merit, stating:

> . . . This argument rests on a narrow reading of *Berkley*, for although there is no evidence of thievery in this case at bar, there is an indication that the disclosure of the documents was in itself a criminal act.

Id.

The Arizona court then turned to the *Dayco* case. There, although the subject documents were also leaked to the press, the documents were not prepared by the government and, thus, such action did not amount to a crime. The Arizona court noted with approval that the *Dayco* court first examined the documents and the manner in which they were kept before reaching its holding:

> . . . The [*Dayco*] court held that, absent any indication that the defendants voluntarily gave the diary to the press, publication of excerpts of the diary should not be considered a waiver of the privilege. Id. citing J. Weinstein & M. Berger, *Weinstein's Evidence*, para 503(a)(4)[01] at 503-31 (1982 ed.) **("Communications which were intended to be confidential but are intercepted despite reasonable precautions remain privileged.")**

Id. (emphasis added).

In the end, the Arizona court found that the facts before it to be "roughly analogous to those in *Berkley* and *Dayco*." The court held that, despite the disclosure of the ATS Memo to the press, the document retained its privileged status because the RTC had affirmatively demonstrated that it had taken "precautions to secure the confidentiality of the ATS memo and that the memo's leak remains inexplicable." Id. at 1429-30.

ER 1.6 requires a lawyer to take reasonable precautions to protect client confidences. The foregoing analysis outlines the kind of procedures the courts have followed in the similar situation of determining when an otherwise privileged communication loses its privileged status because of involuntary disclosure.

It is not difficult, in that light, to conclude that an attorney must take similar precautions with regard to electronically stored communications. It is plain that some efforts must be undertaken. A panoply of electronic and other measures are available to assist an attorney in maintaining client confidences. "Firewalls" - electronic devices and programs which prevent unauthorized entry into a computer system from outside that system - are readily available. Recent upgrades in Microsoft operating systems incorporate such software systems automatically. A host of companies, including Microsoft, Symantec, McAfee and many others, provide security software that helps prevent both destructive intrusions (such as viruses and "worms") and the more malicious intrusions which allow outsiders access to computer files (sometimes call "adware" or "spyware").

Software systems are also readily available to protect individual electronic files. Passwords can be added to files which prevent viewing of such files unless a password is first known and entered. The files themselves can also be encrypted so that, even if the password protection is compromised, the file cannot be read without knowing the encryption key - something that is extremely difficult to break.

Precisely which of these software and hardware systems should be chosen - and the extent to which they must be employed - is beyond the scope and competence of the Committee. This is the kind of thing each attorney must assess. The expectation of the client that the client's records and communications will be held in confidence is significant.

As set forth in the Comment to ER 1.6, an attorney must not only take reasonable precautions to protect client confidences, the lawyer must "act competently" in that regard. ER 1.1 requires, in general terms, that a lawyer act competently with regard to client representation. ER 5.1 and 5.3 require that a lawyer manage the lawyer's firm and assistants in such a way as to be certain that the lawyer's ethical responsibilities are discharged. Once again, it is the lawyer's individual responsibility to know when the lawyer can act competently or not.

It is not surprising that few lawyers have the training or experience required to act competently with regard to computer security. Such competence is, however, readily available. Much information can be obtained through the internet by an attorney with sufficient time and energy to research and understand these systems. Alternatively, experts are readily available to assist an attorney in setting up the firm's computer systems to protect against theft of information and inadvertent disclosure of client confidences.

Malicious Destruction of Client Files

The Inquiring Attorney also expressed concern that allowing access to client files on computers which are also used to access the internet can lead to the malicious destruction of those files. The threat of such destructive viruses is well known.

As with the inadvertent disclosure analysis above, ER 1.6 and 1.1 require the lawyer to act competently in assuring that electronic information transmitted to the attorney is not lost or destroyed. Much of the security software and hardware discussed above provides protection against such destructive intrusions. Moreover, it is common practice to routinely back-up computer files. In that way, even if a computer system is entirely disabled through malicious attack, nearly all data can be retrieved from back-up files. Easy to use and inexpensive systems are available to make this kind of back-up an automatic process.

Once again, the extent to which such systems need to be employed and which systems best accomplish that goal is something which an individual attorney must determine. Doing so competently may require additional research or the employment of an expert consultant.

CONCLUSION

ER's 1.6 and 1.1 require that an attorney act competently to safeguard client information and confidences. It is not unethical to store such electronic information on computer systems whether

or not those same systems are used to connect to the internet. However, to comply with these ethical rules as they relate to the client's electronic files or communications, an attorney or law firm is obligated to take competent and reasonable steps to assure that the client's confidences are not disclosed to third parties through theft or inadvertence. In addition, an attorney or law firm is obligated to take reasonable and competent steps to assure that the client's electronic information is not lost or destroyed. In order to do that, an attorney must either have the competence to evaluate the nature of the potential threat to the client's electronic files and to evaluate and deploy appropriate computer hardware and software to accomplish that end, or if the attorney lacks or cannot reasonably obtain that competence, to retain an expert consultant who does have such competence.

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[1] Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings.

State Bar of Arizona Ethics Opinions

92-07: Conflict of Interest; Criminal Defense Practice 6/1992

Committee discusses the propriety of a public defender's continued representation of a client where the Public Defender's Office is currently representing one person and formerly represented three others who have now been listed as witnesses for the State in the client's criminal case.

FACTS

The inquiring attorney is a Deputy Public Defender in the Public Defender's Office of a metropolitan Arizona county. His inquiry concerns conflicts of interest that may have arisen from the following situation.

The inquiring attorney has been appointed to represent Client A on charges of burglary, theft, and criminal damage. The State alleges that, in the course of committing these crimes, A and several other individuals participated in driving a car through the front of a business establishment so as to gain entry and steal guns.

The Public Defender's Office is currently representing another client, B, regarding a burglary that was carried out in "nearly identical" fashion as the burglary with which A is charged. According to police reports, B, C, D and several other individuals participated in this nearly identical burglary. When questioned by the police about the crime with which A is now charged, B stated that he had heard that A and another individual, E, had been bragging about committing the crime.

C and D are both juveniles, and each have recently been represented by the Public Defender's Office in connection with the crime with which B is now charged. E was recently represented by the Public Defender's Office on unrelated burglary and theft charges, as well as on a subsequent probation violation.

The State has given notice that, at A's trial, the State may call B, C, D and E as witnesses in its case in chief. According to the inquiring attorney, in the course of representing B, C, D and E, it is likely that the Public Defender's Office has gained confidential information from these individuals. Further, at A's trial, the defense would attempt to show that B, not A, committed the crime with which A is charged.

Noting that this type of ethical dilemma is frequently encountered by the Public Defender's Office, the inquiring attorney has inquired whether the ongoing representation by the Public Defender's Office of B, and its previous representations of C, D and E, present a conflict of interest or the possibility of an ethical violation.

QUESTION

Given the Public Defender's Office's present representation of B, and its previous representations of C, D and E, is the inquiring attorney ethically required to withdraw from representation of A in order to avoid a conflict of interest?

ETHICAL RULES INVOLVED

ER 1.7. Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

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ER 1.8. Conflict of Interest: Prohibited Transactions

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(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation

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ER 1.9. Conflict of Interest: Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which the person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as ER 1.6 would permit with respect to a client or when the information has become generally known.

ER 1.10. Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by ER 1.7, 1.8(c), 1.9 or 2.2

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RELEVANT PRIOR ARIZONA OPINIONS

Opinions Nos. 89-08 (October 19, 1989) and 91-05 (February 20, 1991).

OPINION

Whether the Public Defender's Office can continue to represent A on charges of burglary, theft and criminal damage is governed by ER 1.7, ER 1.9 and ER 1.10. ER 1.7(a) provides that a lawyer may not represent a client if the representation of that client will be directly adverse to another client, unless the lawyer reasonably believes that neither client will be adversely affected by such representation, and each client consents after consultation. The Comment to ER 1.7 further emphasizes this duty of loyalty:

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated.

ER 1.7(a) applies to the Public Defender's Office's concurrent representation of A and B. The Public Defender's Office is currently representing B on a crime nearly identical to the crime with which A is now charged. B apparently has information that tends to inculpate A, and the State has indicated that it will call B as a witness at A's trial. One of A's defenses is that B, and not A, committed the crime with which A is now charged. The Public Defender's Office will therefore be acting as an advocate against one of its own clients, when the inquiring attorney attempts to cross-examine or otherwise discredit or inculpate B.

In our Opinion No. 91-05 (February 20, 1991), we determined that a law firm's former client, who became an adverse witness in a criminal case, had "materially adverse interests" for purposes of ER 1.9(a). A key element in our reasoning in that opinion was the fact that the current client's objective would be to discredit the former client's testimony in any way possible, including suggesting that the former client was criminally culpable. Id. at 8. Of course, where conduct constitutes a conflict of interest for purposes of ER 1.9(a), in the context of representation against a former client, it will also be prohibited by. ER 1.7 where the representation is materially adverse to a current client. We accordingly conclude that, in order to avoid a conflict of interest, the inquiring attorney must withdraw from continued representation of A.

The same reasoning applies to the Public Defender's Office's representation of B. Once the inquiring attorney withdraws from representing A, A becomes a former client of the Public Defender's Office for purposes of ER 1.9. Since A and B have adverse interests, and since A will almost certainly be a witness in B's criminal case, the Public Defender's Office must also withdraw from representing B.

The specific inquiry regarding whether the inquiring attorney may ethically continue to represent A ends with the determination that to do so while representing B violates ER 1.7(a). However, because this type of ethical dilemma is an ongoing problem for the Public Defender's Office, we will complete our analysis of the potential ethics violations created by the inquiring attorney's representation of A, in light of the Public Defender's Office's previous representations of C, D, and E.

A lawyer who has formerly represented a client in a matter must not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after consultation. ER 1.9(a). Arizona courts have held that two cases are substantially related if they arise from a "common nucleus of facts", or where the two representations present a "substantial danger" of the former client's confidences being used against that client in the subsequent representation. Arizona Opinion No. 91-05; See, also, In Re Ockrassa, 165 Ariz. 576, 578-9, 799 P.2d 1350, 1352-53 (1990); Alexander v. Superior Court, 141 Ariz. 157, 163-164, 685 P.2d 1309, 1315-1316 (1984).

There is no indication that A's present charges and E's past burglary and theft charges and probation matter arose out of a common nucleus of facts. On the other hand, the Public Defender's office's representation of C and D, as participants in the crime with which B is presently charged, may indeed have arisen out of a common nucleus of facts. The question the inquiring attorney must resolve is whether the "nearly identical" crime with which B, C and D are charged is factually related to the matter in which he is representing A. If so, the common nucleus test prohibits subsequent representation of A.

Whatever the result of the analysis under the common nucleus test, it is clear that the Public Defender's Office's previous representations of C, D and E creates a substantial danger of the confidences of those individuals being used against them in the course of the inquiring attorney's representation of A. Information disclosed by C, D and E would likely be of great value to the inquiring attorney in discrediting their testimony, they being now adverse witnesses to A. The inquiring attorney is prohibited by ER 1.6 and ER 1.9(b) from using confidential information to the disadvantage of C, D and E. Therefore, we believe that, to the extent to which any of the information gained by the Public Defender's Office during its prior representations of C, D and E would be useful to the inquiring attorney in the present matter involving the representation of A, a substantial danger of adverse use of confidential information exists and the matters are "substantially related" for purposes of ER 1.9 (a).

The next step in the ER 1.9(a) analysis is the determination of whether the substantially related representations would be materially adverse to the interests of the former clients C, D and E. The inquiring attorney's representation of A is materially adverse to C, D and E because of the latters' status as witnesses for the State in the present proceedings against A. Arizona Opinion No. 91-05 (February 26, 1991); See also Rodriguez v. State, 129 Ariz. 67, 74, 628 P.2d 950, 957 (1981).

Assigning different Deputy Public Defenders to A's and B's cases, or screening Deputy Public Defenders who worked on C's, D's, or E's cases from representation in A's case, would not be a solution to the conflict of interest. ER 1.10, concerning imputed disqualification, applies to the Public Defender's Office as if the office were a "firm". See our Opinion No. 89-08 (October 19, 1989).

In summary, we answer the inquiring attorney's question as follows:

The inquiring attorney's representation of A would be directly adverse to B, a present client of the Public Defender's Office. Accordingly, in order to avoid a conflict of interest, the inquiring attorney must withdraw from continued representation of A, and the Public Defender's Office must withdraw from representing B. In addition, the inquiring attorney's representation of A is substantially related and materially adverse to C, D and E, who are adverse witnesses in the present proceeding against A and are former clients of the Public Defender's Office. Therefore, ER 1.9(a) requires that the inquiring attorney withdraw from continued representation of A.

State Bar of Arizona Ethics Opinions

96-03: Conflict of Interest; Public Defenders; Imputed Disqualification; Criminal Representation; Ineffective Assistance

2/1996

A public defender must withdraw from representation of a criminal defendant who has a "colorable" claim of ineffective assistance of counsel against another member of the public defender's office. The timing of the withdrawal will depend upon the facts of each individual case. [ERs 1.7, 1.10. 1.16]

The Committee has received a request from a public defender office concerning the ethical propriety of representing defendants in post-conviction relief (PCR) actions who seek to raise claims of ineffective assistance against other lawyers in the same office. While the Committee has concluded that it would be unethical for the public defender's office to pursue claims of ineffective assistance against members of the same office, disqualification may not be required simply because a defendant wishes to present such a claim.

FACTS[1]

The public defender's office is appointed to represent defendants challenging their sentences through Petitions for Post-Conviction Relief under Rule 32, Arizona Rules of Criminal Procedure. Presumably, the PCR remedy has become more prevalent recently since the Arizona Supreme Court abolished the right of a criminal defendant to file an appeal from a plea of guilty or no contest. See Rule 17.1(e), Arizona Rules of Criminal Procedure. The only vehicle for challenging a conviction after a guilty plea is the filling of a PCR petition.

Apparently, an initial contact letter is sent to the PCR client containing a list of the grounds for relief. One of the grounds is, of course, the denial of the defendant's Sixth Amendment right to effective assistance of counsel. A claim of ineffective assistance may not be asserted for the first time on

appeal, but must be presented to the trial court in a Petition for Post-Conviction Relief. See State v. Allgood, 171 Ariz. 522, 8 P.2d 1290 (Ariz. App. 1992).

According to the inquiring attorneys, in about 20% of the PCR cases the defendant wishes to assert a claim of ineffective assistance against trial counsel who also is a member of the public defender's office. Many of these complaints are unspecific and simply allege that the deputy public defender was ineffective.

After appointment, the public defender reviews these cases to determine whether the defendant has presented a "colorable" claim of ineffective assistance of counsel. To establish a "colorable" claim the petitioner must prove that counsel's performance was deficient and that it prejudiced the outcome of the proceeding. State v. Fulminante, 161 Ariz. 237, 260, 778 P.2d 602, 625 (1989). If a "colorable" claim of ineffective assistance is deemed present, the public defender's office moves to withdraw from the case.

QUESTION PRESENTED

1. Does the PCR lawyer have an ethical responsibility to withdraw when the defendant makes the initial claim of ineffective assistance of counsel by another member of the public defender's office?

2. Does the responsibility to withdraw from representation arise merely from the fact that a specific allegation of ineffectiveness of the public defender has been made, or must the PCR lawyer be convinced that the client has a "colorable" claim of ineffective assistance of counsel before withdrawing?

RELEVANT ETHICAL RULES

ER 1.7 Conflict of Interest: General Rule

* * * * *

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1)the lawyer reasonably believes the representation will not be adversely affected; and

(2)the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

* * * * *

ER 1.10 Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by ER 1.7, 1.8(c), 1.9 or 2.2.

* * * * *

ER 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1)the representation will result in violation of the Rules of Professional Conduct or other law;

* * * * *

OPINION

This inquiry presents the question of when, not if, a public defender should withdraw from representation of a defendant who seeks to assert an ineffective assistance of counsel claim against another member of the public defender's office. Numerous authorities have concluded that such representation would present a disqualifying conflict for the public defender. As the American Bar Association has noted in its Standards for Criminal Justice:

> If the defender attorney on appeal believes that an issue of ineffective assistance of counsel should be presented, the defender program should be excused and private counsel appointed to the case. Unless this is done, the appellate lawyer from the defender office will be faced with a conflict of interest in complaining about the conduct of a colleague who represented the client in the trial court.

ABA Standards for Criminal Justice, Providing Defense Services, (3rd ed. 1992). Standard 5-6.2, Commentary at page 84. See also, Nebraska State Bar Ethical Opinion, 88-1 (a county public defender may not challenge the competence of another county public defender in the same office in order to establish a theory of ineffective assistance of counsel in an appeal of a conviction); Nebraska State Bar Ethical Opinion, 90-01 (a lawyer who is a public defender may not represent a defendant in a federal habeas corpus action to overturn his conviction and sentence where the grounds for relief involve alleged ineffective assistance of another lawyer in the public defender's office).

Thus, there is no question that if an ineffective assistance of counsel claim is to be made in the PCR, the public defender's office must withdraw. The question of when that withdrawal should be accomplished must be determined by the facts of each individual case. It could be argued that the client's mere assertion of ineffective assistance should cause the public defender to withdraw. On the other hand, patently frivolous claims of ineffective assistance which the PCR public defender does not believe represent a "colorable" claim should not result in wholesale disqualification of the public defender's office.

The Committee believes that the decision of when to seek withdrawal can best be made through the guidance of ER 1.7(b). That section provides that a lawyer "shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests." Of course, through the imputed disqualification provision of ER 1.10, id., if trial counsel in the public defender's office would have a conflict, then the PCR lawyer would also have a conflict. See Opinion 89-08 (public defender offices a firm within meaning of ER 1.10(b)). The commentary to ER 1.7 clearly notes that lawyers will rarely be able to give appropriate advice and representation when their own conduct is being questioned. "If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give the client detached advice." ER 1.7 Comment.

In many circumstances, the PCR lawyer's representation may not be "materially" limited by a conclusory claim of ineffective assistance of counsel. Applying ER 1.7(b) requires a case-specific inquiry into the impact of conflicting responsibilities. See G. Hazard, Jr. and W. Hodes, The Law of Lawyering, § 1.7:301 at pp. 247-48 (1996 Supp.) Mere "marginal limitations" on representation may not require withdrawal. Id.

It can be assumed that some of the claims of ineffective assistance, even if proved, would not merit relief under prevailing legal standards. Although the decision of whether the PCR lawyer feels there is any limitation on the representation would be up to him or her, it is unlikely that such frivolous claims would engender such a conflict.

On the other hand, if the claim of ineffective assistance has facial merit and requires further investigation, ER 1.7(b) also provides appropriate guidance. Under that section the lawyer can continue representation if:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents after consultation.

Thus, if the PCR public defender reasonably believes that his or her representation will not be adversely affected by the fact that a conclusory claim of ineffective assistance has been made against another member of his office, and the client consents after consultation on this issue, then representation can continue. "Consultation" is defined as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Consent would allow the PCR public defender to properly investigate the claim of ineffective assistance of counsel and determine whether there is a "colorable" claim of ineffective assistance, then it should not be included in the PCR petition, despite the client's wishes. See ABA Standards for Criminal Justice, the Defense Function Standard 4-8.6.

After consultation and explanation of the conflict, if the client refuses to consent then it would be the Committee's view that the PCR public defender should seek to withdraw. Indeed, even if ethical rules did not require it, it would probably be in the best interest of the PCR public defender to obtain

consent from the client to continue representation lest his or her conduct be subject to claims that the investigation was inadequate as a result of the conflict of interest.[2]

CONCLUSION

A public defender must withdraw from representation of a defendant who has a "colorable" claim of ineffective assistance of counsel against another member of the public defender's office. The timing of that withdrawal will depend upon the facts of each individual case. If the claim is frivolous for example, no further inquiry is probably necessary. If the claim has facial merit, the PCR public defender may investigate that claim as long as he or she reasonably believes that the presentation will not be adversely affected and the client consents after consultation.

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[1]Formal opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. © State Bar of Arizona 1996

[2]Consent, of course, would not be sufficient to allow representation after a "colorable" claim has been asserted. In this situation the conflict is so acute that no reasonable lawyer would be able to say that his or her representation was not adversely affected. As the commentary to ER 1.7 makes clear, "... when a disinterested lawyer would conclude that the client should not agree to representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."

State Bar of Arizona Ethics Opinions

93-13: Notice of Change of Judge 12/1993

Blanket use of peremptory challenges against a particular judge impermissible if purposes is to influence judge's decision; notices should be filed based on case-be-case review.

FACTS

The Presiding Judge of a City Court alleges the following facts and has requested that we issue a formal opinion pursuant to paragraph 4 of our Statement of Jurisdictional Policies: "Such opinions will be rendered only when requested by ...a member of the Arizona judiciary (state or federal); ...."

The City Prosecutor's Office has filed blanket notices of change of judge in criminal cases assigned to a particular municipal judge pursuant to Rule 10.2 of the Arizona Rules of Criminal Procedure, 17 A.R.S. The filing of the blanket preemptory challenges has apparently been prompted by the City Prosecutor's perception of the particular judge's judicial philosophy as perceived from prior rulings on questions of law.

QUESTION

May a Prosecutor's Office ethically issue blanket notices of change of judge pursuant to Rule 10.2 of the Arizona Rules of Criminal Procedure in cases assigned to a particular judge?

ETHICAL RULES INVOLVED

ER 1.7(b). **Conflict of Interest: General Rule**

ER 3.5. **Impartiality and Decorum of the Tribunal**

ER 5.1. **Responsibilities of a Partner or Supervisory Lawyer**

ER 5.2. **Responsibilities of a Subordinate Lawyer**

OPINION

ER 3.5(a) provides in pertinent part:

"A lawyer shall not:

(a) seek to influence a judge,... or an official of a tribunal by means prohibited by law;

*****"

Accordingly, in view of this language, two questions arise from the facts alleged in the request: (1) is the blanket use of peremptory challenges against a particular judge prohibited by law?; and (2) does such conduct by the Prosecutor's Office constitute an attempt to influence a judge?

Both issues were discussed by our Supreme Court in State v. City Court of City of Tucson, 150 Ariz. 99, 722 P.2d 267 (1986). There the Chief City Prosecutor of Tucson promulgated a policy requiring all Deputy City Prosecutors to disqualify a particular Magistrate pursuant to Rule 10.2 of the Arizona Rules of Criminal Procedure in any criminal case involving the charge of D.U.I. In a three-week period, the City Prosecutor's Office filed 258 Notices of Change of Judge against the Magistrate. The Chief City Prosecutor stated that the reason for the policy was that the Magistrate "... had consistently been ruling against the State in an arbitrary and capricious manner, both in pretrial motions, and at trial." (150 Ariz. at 101)

The Supreme Court recognized that Rule 10.2 permits a party in a criminal case to disqualify a judge "for no cause or reason," and that Rule 10.2 applies to non-record courts such as City Courts. The Court's majority, however, found that the exercise of peremptory challenges by the City Prosecutor in the manner and for the reasons set forth above was an abuse of the Rules of Criminal Procedure for two reasons:

1. The procedure infringed upon the obligation of each Deputy City Prosecutor to exercise his or her individual professional judgment on a case-by-case basis; and

2. The policy amounted to an improper attempt to influence a judge in his judicial decisions, i.e., the effect of the policy was to bring pressure upon the particular Magistrate. (150 Ariz. at 102.)

The Court's opinion stated:

"The Tucson City Prosecutor's policy with its attendant effects was an attempt to intimidate not only [the Magistrate] but by example the entire Tucson City Court. As such the policy was an abuse of the rules [Rule 10.2] and a threat to the independence and integrity of the judiciary which cannot be allowed." (150 Ariz. at 102-103.)

Justice Holohan, in his dissenting opinion, added the following:

> "If the purpose of the disqualification was to 'educate' the magistrate, the attorneys may have violated the Arizona Rules of Professional Conduct in attempting to improperly influence a judge. See, Rules of Professional Conduct ER 3.5." (150 Ariz. at 105.)

Therefore, the blanket filing of peremptory challenges against a particular judge by a Prosecutor's Office may constitute an abuse of Rule 10.2, and an attempt to influence a judge, all in violation of ER 3.5, depending upon the motivation underlying the practice. If the office policy of filing blanket notices against a particular judge is for the purpose of bringing (93-13) 2that judge "into line" on judicial decisions, such as legal rulings and sentencing, the conduct can be considered an attempt to influence a judge through an abuse of Rule 10.2. However, the majority opinion in State v. City Court of City of Tucson, supra, indicates that, if the decision to notice a particular judge is made on a case-by-case basis by each Deputy City Prosecutor in accordance with his or her professional judgment, rather than as a blanket office policy, the conduct would not necessarily constitute an abuse of Rule 10.2 or a violation of ER 3.5. (150 Ariz. at 102.)

State Bar of Arizona Ethics Opinions

89-04: Confidentiality of Information; Conflict of Interest; Successive Government and Private Employment

5/1989

Where a lawyer formerly associated with County Attorney's office takes a public defender position, the lawyer may not represent a defendant in connection with a matter about which the lawyer obtained confidential information relating to the government's representation of the client; consent is also required in all cases in which the lawyer actually represented the government, by appearance or otherwise, and now seeks to represent an individual in the same or substantially related matter; the government's consent is likewise required where the lawyer participated personally or substantially in the prosecution of that matter.

FACTS

Attorney A was employed as a full-time prosecuting attorney in the County Attorney's Office of County X from December, 1984, until January, 1989. A few days after leaving the County Attorney's Office, A began work as an alternative public defender in County X. The alternative public defender position is designed to handle defense work that the Public Defender's Office is unable to take on for various reasons.

Because of the heavy criminal case load in County X, the presiding judge relieved the Public Defender's Office of all appointments made after January 1, 1989, and ordered a moratorium on such appointments until May 1, 1989. Many of the cases to be reassigned involve offenses, investigations, indictments, arraignments or convictions that occurred during A's tenure as a deputy county attorney. A has been assigned to represent the defendants in a number of these cases. Although A recognizes that he cannot represent those defendants whom he prosecuted while employed as a deputy county attorney, he inquires as to the ethical propriety of representing defendants whose cases were handled by others in the county attorney's office while he was employed there.

QUESTIONS

1. May A properly represent defendants in cases about which A learned material information while employed as a deputy county attorney?

2. May A properly represent defendants in cases about which A, while employed as a deputy county attorney, learned only that those defendants were being investigated or charged?
3. May A properly represent defendants in proceedings to revoke probation, where A learned material information relating to the underlying convictions while employed as a deputy county attorney, but has learned nothing concerning the allegations contained in the petitions to revoke probation?

ETHICAL RULES INVOLVED

ER 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation,...

*****

ER 1.7. Conflict of Interest: General Rule

*****

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation....

ER 1.9. Conflict of Interest: Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as ER 1.6 would permit with respect to a client or when the information has become generally known.

ER 1.11. Successive Government and Private Employment

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.

*****

OPINION

A seeks guidance concerning three groups of cases that are, and will continue to be, assigned to him. The common factual predicate is that each group involves the potential representation of criminal defendants who were investigated or charged by the County Attorney's Office during A's employment as a deputy county attorney. A assumes correctly that he is ethically prohibited from representing defendants whom he prosecuted personally. The three groups identified include only those cases prosecuted by deputy county attorneys other than A. Although we have not addressed this ethical problem under the Model Rules of Professional Conduct, we have visited it in a series of opinions issued over a span of more than twenty years. Before resolving the issue under the Rules, therefore, we briefly summarize our previous analysis in this area.

In our earliest opinions, we adopted the reasoning articulated in ABA Formal Opinion 134 (March 15, 1935). That opinion construed former Canon 36 to preclude a staff member in a state's attorney's office from representing, after retirement, any defendant whose case originated, was investigated or was passed upon (either by the lawyer involved or his associates) while he was a staff member. Although the language of Canon 36 referred only to matters "investigated or passed upon," the ABA Committee extended the prohibition to cases originating in the state's attorney's office during the lawyer's employment, on the theory that a public perception of impropriety existed in such cases.

We embraced this reasoning in our Opinion No. 190 (May 31, 1966), stating that an attorney could not represent a criminal defendant in connection with a charge lodged against that defendant while the attorney had been a deputy county attorney, despite the fact that the attorney had not taken part in any activity of the county attorney's office concerning the investigation or prosecution of the defendant. We reasoned that "the public would naturally assume that whatever confidential information is known by one member of the County Attorney's staff would probably become known to the others," and stated that, under normal circumstances, we would adhere to the rationale of ABA Formal Opinion 134. Id. at 2-3. However, due to the presence of unusual circumstances in the case submitted, this principle was not applied. Id. at 2-3.

In our Opinion No. 292 (November 6, 1969), we again applied the reasoning of ABA Opinion 134. In that case, a criminal defendant committed an offense before the inquiring attorney was employed as a deputy county attorney, and was charged, tried and convicted for that offense after the attorney left the County Attorney's Office. While employed in the County Attorney's Office, the attorney had no information concerning the offense, and never discussed any aspect of the case with any representative of that office. Nonetheless, we held that the attorney should decline representation of the defendant in post-conviction proceedings, several members of the committee noting their dissents.

We departed from our previous reasoning in Opinion No. 73-1 (January 19, 1973). Although we cited and discussed an earlier opinion (No. 271) in which we had followed ABA Opinion 134, we relied on EC 9-3 and stated that:

> "...it would be ethical for a lawyer transferring from the county attorney's office to the public defender's office, to handle in the public defender's office any matter in which he did not have 'substantial responsibility' in the county attorney's office."

Id. at 2. Thus, the mere fact that a case had originated in, or was investigated or passed upon by, the County Attorney's Office during an attorney's employment there, was no longer enough to disqualify him or her from subsequently representing the defendant. Instead, the dispositive issue became whether or not the attorney had "substantial responsibility" for the matter while employed in the County Attorney's Office.

With one exception, our subsequent opinions have adhered to the "substantial responsibility" test. In Opinion No. 74-22 (August 14, 1974), for example, we held that a former deputy county attorney was not ethically precluded from, representing a defendant who was charged and indicted during his tenure at the County Attorney's Office, even though his partner in private practice, a former deputy county attorney in the same office, had been physically present in the grand jury room when evidence was presented against the defendant. Neither attorney had any responsibility with regard to the case against the defendant and, although one had been in a position to have heard or learned something of the case, he had paid no attention to it and had no independent recollection of any such information. Similarly, in Opinion No. 76-1 (February 11, 1976), we held that a part-time deputy county attorney could, after leaving that position, represent a defendant who was indicted about the time the attorney left based upon information and charges presented by the County Attorney's Office. The facts indicated that the attorney had no knowledge of the case while occupying his part-time position, was unaware of any facts supporting the indictment, and took no responsibility in the case. See also our Opinions Nos. 73-22, 74-4, 76-2 and 83-18.

Although our opinions in this area have generally focused on the "substantial responsibility" test, we have recognized that, under certain circumstances, a lawyer's involvement in a case may trigger another ethical concern that precludes later representation of another party, namely, the potential for use of confidential information relating to representation of the former client. In Opinion No. 74-16 (June 4, 1974), we addressed a case in which a deputy county attorney had rendered an opinion concerning the legality of an eavesdropping procedure that was contemplated during the investigation of certain individuals. Later, after entering private practice, the lawyer sought guidance with respect to his possible representation (or assistance in representation) of one of the individuals in that earlier case. We held that it would be ethically improper for that lawyer, or his law firm, to undertake such representation or assistance, regardless of whether rendering an opinion constituted "substantial responsibility." In reaching this conclusion, we relied on DR 9-101, which required that a lawyer avoid even the appearance of impropriety, and DR 4-101, which required a lawyer to preserve the confidences and secrets of his or her client. We stated that, although the former deputy county attorney may not have had substantial responsibility in the case, he was "involved in the case to a degree that would render it improper for him now to represent the defendant." Id. at 2.

We now turn to the Model Rules, which incorporate much of the same analysis articulated in our previous opinions. The Rules require a three-part analysis. First, we must examine the potential for use of confidential information relating to representation of the former client. The relevant rules are ER 1.6, ER 1.7(b) and ER 1.9(b). ER 1.9(b) and ER 1.6 prohibit a lawyer from using information relating

to the representation of a former client to the disadvantage of that former client, unless the information has become generally known or the former client consents to the subsequent representation. ER 1.7(b) states the general conflict of interest rule that a lawyer shall not represent a client if that representation may be materially limited by the lawyer's responsibilities to another client, unless the lawyer reasonably believes that the representation will not be adversely affected and the client consents after consultation. Thus, where a deputy county attorney acquires confidential information relating to the representation of the county in a particular case, that attorney cannot later represent a defendant in the same matter without securing the county's consent.

The second and third steps of the analysis are found in ER 1.9(a) and ER 1.11. ER 1.9(a) provides that a lawyer who has "represented" a client in a matter shall not later represent another person "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client," absent the former client's consent after consultation. ER 1.11(a) essentially codifies our prior "substantial responsibility" test by providing that, absent express law to the contrary, "a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation." This language also codifies our holding in Opinion No. 83-15 that a lawyer is not ethically prohibited from accepting the consent of a governmental body. ER 1.11; Opinion No. 83-15. Although it addresses only the move between government and private practice, as opposed to the move from one branch of the government to another, we recently concluded that ER 1.11 applies equally to the latter situation. See Opinion No. 85-6 (October 18, 1985).

The relationship between ER 1.9 and ER 1.11 deserves comment, because the two rules address related, but analytically distinct concerns. Under ER 1.9, any act of representation, regardless of the level of participation in the matter, precludes later representation of another client with adverse interests in the same or a substantially related matter, absent valid consent. Under ER 1.11, a lawyer's personal and substantial participation in a matter, regardless of whether that lawyer "represented" the client, precludes representation of another client in connection with the same matter. Implicit in the Rules, therefore, is a distinction between representation and participation. Although undefined, we read the term "represented," as it is used in ER 1.9, to encompass those actions by which an attorney substitutes himself for the client. Thus, any appearance on behalf of a client, whether in negotiations or in court, constitutes representation, as does the signing of papers filed with the court. This rule simply addresses the concern identified in Code Canon 9 that "[a] lawyer should avoid even the appearance of impropriety." Code Comparison to ER 1.9. Where a lawyer has represented a client, in the sense of substituting himself or herself for that client, subsequent representation of another client with materially adverse interests in the same or a substantially related matter will necessarily be perceived as "changing sides." Thus, the former client's consent is required. On the other hand, where a government lawyer has not represented the government in a matter, the likelihood that his or her later representation of a private party in connection with the same matter will be perceived as "changing sides" turns on the level of that lawyer's prior participation, namely, whether it can be considered personal and substantial.

Applying the preceding three-step analysis to the questions before us, we first conclude that A is ethically precluded from representing defendants in cases involving facts about which A learned material information while employed as a deputy county attorney, unless the county consents after consultation. Any material information that A learned while in the county attorney's office that related to particular defendants' cases is necessarily confidential within the meaning of ER 1.6. A must not use such information to the disadvantage of the county, and this has the potential to impair representation of a defendant materially. Even if A reasonably believes that the representation will not be impaired, consultation and consent is mandatory. ER 1.7(b).

On the other hand, A may represent defendants in those cases in which A's knowledge gained as a deputy county attorney was limited to learning that the defendants were being investigated or charged. Such facts are generally known, and there is no indication that A represented the county within the meaning of ER 1.9 or that his level of participation was personal and substantial. Under such circumstances, the assigned representation is within the ethical parameters of the Rules.

We do not have sufficient facts before us to enable us to determine whether A is precluded from representing defendants in cases involving proceedings to revoke probation, in which A learned material information relating to the underlying conviction but has learned nothing concerning allegations in the petitions to revoke probation. The facts do not indicate that A represented the county, within the meaning of ER 1.9, in prosecuting the defendants who now face possible revocation of probation. Moreover, although the facts do not indicate the level of A's participation in these cases, the proceedings relating to revocation of probation do not constitute the same matter as the underlying prosecution, and thus ER 1.11 would not bar such representation. The dispositive question, therefore, is whether A's representation of the defendant would involve confidentiality problems. If the proceedings to revoke probation involve allegations and proof wholly independent of the underlying conviction, we see no reason why such representation might force A to use confidential information to the disadvantage of the county or impair his representation of the defendant. We can conceive of circumstances, however, in which the probation revocation proceedings and the underlying conviction would not be wholly independent. In such circumstances, representation of the defendant would be improper under ER 1.9(b), ER 1.6 and ER 1.7(b), absent the county's consent after consultation. This is necessarily a highly factual issue that A must resolve on a case-by-case basis.

A number of ethical problems are inherent in situations where a lawyer formerly associated with the County Attorney's Office takes a public defender position. We therefore take this opportunity to sum up our approach to these problems under the Model Rules. We believe a three-part analysis is appropriate. First, absent the government's consent, a lawyer may not represent a defendant in connection with a matter about which the lawyer obtained confidential information relating to the representation of the government. Second, consent is also required in all cases in which the lawyer actually represented the government, in the sense of substituting into the government's place (by appearance or otherwise), and now seeks to represent an individual in the same or a substantially related matter. Third, consent is required in cases where, although the lawyer did not represent the government in the matter, he or she participated personally and substantially in that matter.

State Bar of Arizona Ethics Opinions

15-01: Plea Agreements; Waiver; Ineffective Assistance; Conflict of Interest; Criminal Representation

6/2015

The conflict-of-interest rules prohibit a defense attorney from advising a criminal defendant to waive the defendant's right to raise that attorney's ineffective assistance of counsel. The ethical rules also prohibit a prosecutor from insisting that a defendant waive the right to raise ineffective assistance of counsel and prosecutorial misconduct claims. Opinion 95-08 is accordingly withdrawn.

FACTS

The Arizona Rules of Professional Conduct apply not only to state prosecutors but also to federal prosecutors practicing in Arizona.[1] As a condition of their plea offers, certain prosecutors have required defendants to waive all post-conviction judicial review. The exact language of these waivers has varied over the years and will undoubtedly continue to vary in the future. As a common example, a typical federal waiver required that the defendant give up any right to raise any claim on appeal or in a habeas corpus petition.[2] The defendant also generally has to acknowledge in the signed plea agreement that the defendant is "satisfied" that defense counsel has acted in a "competent manner" and has "carefully reviewed every part of" the plea agreement with the defendant. The defense attorney generally must then approve and sign the agreement, representing (1) that the attorney has discussed with the defendant the plea agreement, the defendant's constitutional and other rights, and the consequences of the guilty plea and (2) that the attorney agrees that the terms of the agreement "are in the best interests of my client."[3]

Because such waivers do not except claims arising from the defense attorney's own ineffective assistance of counsel or the prosecutor's own misconduct, the waivers thus attempt to eliminate defendants' rights to raise ineffective assistance of counsel and prosecutorial misconduct claims (among other claims) on appeal or in post-conviction relief proceedings. Although the Arizona state courts generally do not enforce these broad waivers,[4] the United States District Court for the District of Arizona and United States Court of Appeals for the Ninth Circuit generally do enforce them.[5] While federal prosecutors have recently revised their internal policy and are not currently requiring defendants to waive their right to raise ineffective assistance of counsel claims,[6] the policy does not address the ethical implications of the waivers described above and does not address waivers of prosecutorial misconduct claims.[7]

ISSUES PRESENTED

I. Whether a defense attorney may ethically advise the client to enter a plea agreement waiving the client's right to seek post-conviction judicial relief from the attorney's ineffective assistance of counsel.

II. Whether a prosecutor may ethically condition a plea offer on the defendant's and defense attorney's agreement that the defendant waive the right to seek post-conviction judicial relief from the defense attorney's ineffective assistance of counsel and the prosecutor's misconduct.

RELEVANT ETHICAL RULES

ER 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

ER 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in ER 1.0(e), is required by these Rules;

* * *

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) In a criminal case, a lawyer shall promptly inform a client of all proffered plea agreements.

ER 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client gives informed consent, confirmed in writing, and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

ER 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.. . .

ER 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

* * *

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

* * *

COMMENT

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.

* * *

ER 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

* * *

(d) engage in conduct that is prejudicial to the administration of justice;

* * *

RELEVANT ETHICS OPINIONS

Ariz. Ethics Ops. 95-08 and 91-23; Ala. Ethics Op. 2011-02; Fla. Ethics Op. 12-1 (2012); Ky. Ethics Op. E-435 (2012); Mo. Ethics Op. 126 (2009); Nev. Ethics Op. 48 (2011); N.C. Ethics Op. 129 (1993); Ohio Ethics Op. 2001-6; Penn. Ethics Op. 2014-100; Texas Ethics Op. 571 (2006); Utah Ethics Op. 13-04 (2013); Va. Ethics Op. 1857 (2011); Vt. Ethics Op. 95-04 (1995).

OPINION

In our Opinion 95-08, we offered one of the first ethics opinions on the following question: whether defense attorneys violate ER 1.8(h)[8] by recommending that defendants enter plea bargains in which the defendants agree to waive their right to pursue an ineffective assistance of counsel claim. Over a strong dissent, we concluded that defense attorneys did not violate ER 1.8(h) by recommending such waivers. That opinion did not, however, examine the conflicts of interest inherent in these waivers. Having since examined both the conflicts of interest and the subsequent ethics opinions from other jurisdictions on this issue, we hereby withdraw Opinion 95-08. As explained below, it is impermissible for defense attorneys to advise, and for prosecutors to insist, that defendants prospectively waive the right to challenge the professional conduct of those same defense attorneys and prosecutors.

I. A Defense Attorney May Not Advise the Client to Waive Claims of Ineffective Assistance of Counsel Because Such Advice Involves an Unwaivable Conflict of Interest.

The waiver at issue presents an unwaivable conflict of interest for defense attorneys. A conflict exists whenever "there is a significant risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer." ER 1.7(a)(2); ER 1.7 cmt. [8] ("Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests."). The waiver wedges defense attorneys between the proverbial rock and a hard place: The attorneys must objectively and competently advise the client about the plea agreement and its provisions, yet the attorneys cannot be fully objective about challenges to the quality of their own representation, which they have an interest in avoiding or mitigating. See ER 1.4(c); ER 1.7(a)(2); ER 2.1 (requiring attorneys to "exercise independent professional judgment and render candid advice").

Indeed, the conflict created is quite formidable. Successful ineffective-assistance-of-counsel challenges often (1) jeopardize the attorneys' future employment (whether as a public defender or panel attorney), (2) harm the attorneys' professional reputation, (3) serve as a prelude to professional discipline, and (4) serve as a predicate to the clients' later malpractice claims. Moreover, because these attorneys must advise the defendants to waive ineffective assistance claims arising from sentencing and other proceedings yet to occur, the attorneys cannot adequately discharge their duty to communicate sufficient information to enable the clients to enter informed waivers. See, e.g., ER 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); ER 1.7 cmt. [21] ("If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved.").

In light of defense attorneys' adverse interests, inability to communicate sufficient information to secure informed consent, and diminished ability to render objective advice when advising on their own performance, the resulting conflict of interest is not waivable; in other words, defense attorneys cannot "reasonably believe" that they "will be able to provide competent and diligent representation to each affected client." ER 1.7(b)(1). As the comment notes, moreover, "if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice." ER 1.7 cmt. [1]; ER 2.1. Therefore, defense attorneys cannot ethically advise their clients to enter a plea agreement that purports to waive their clients' right to raise the attorneys' ineffective assistance of counsel. This conclusion, of course, would not ordinarily apply to waivers on which the clients receive independent representation.[9]

II. A Prosecutor May Not Ethically Condition a Plea Offer on the Defendant's Waiver of Ineffective Assistance of Counsel and Prosecutorial Misconduct Claims.

A. Ineffective Assistance of Counsel Waivers

Except to the extent noted below, it is likewise impermissible for prosecutors to condition plea offers on defendants' waiver of ineffective assistance of counsel claims. Lawyers may not "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." ER 8.4(a). By requiring defense counsel to participate in these waivers, prosecutors induce defense counsel to violate ER 1.7 (and, depending on the facts, ERs 1.1, 1.4, and 2.1).[10] Moreover, requiring these waivers from defendants who are not independently represented is detrimental to criminal defendants' right to counsel.[11]

This problem is further aggravated because the waivers require defendants to waive claims that arise after the plea agreement.[12] Because such waivers require defendants to proceed with materially conflicted representation, prosecutors would be effectively compelling defendants to proceed without counsel during critical stages of the proceeding.[13] This conduct is inconsistent with ERs 3.8(c) and 8.4(d), which prohibit prosecutors from obtaining from an unrepresented defendant "a waiver of important pretrial rights" and from engaging in conduct "prejudicial to the administration of justice." See, e.g., Fla. Ethics Op. 12-1 (2012); Mo. Ethics Op. 126 (2009) ("We believe that it is inconsistent with the prosecutor's duties as a minister of justice and the duty to refrain from conduct prejudicial to

the administration of justice for a prosecutor to seek a waiver of post-conviction rights based on ineffective assistance of counsel or prosecutorial misconduct."). Thus, prosecutors may not require blanket waivers of ineffective assistance of counsel claims.

B. Prosecutorial Misconduct Waivers

Requiring defendants to waive their right to raise a prospective claim of prosecutorial misconduct is inconsistent with prosecutors' role as a "minister of justice" and is "prejudicial to the administration of justice." ER 3.8 cmt. [1]; ER 8.4(d). Prosecutorial misconduct includes (but is not necessarily limited to) destroying evidence, suborning perjury, and knowingly failing to turn over exculpatory evidence.[14] "A prosecutor does not serve justice by attempting to shield his or her past or future misconduct from scrutiny by obtaining a criminal defendant's waiver of appellate or postconviction claims based on allegations of prosecutorial misconduct." Ohio Ethics Op. 2001-6; cf. ER 3.8(d) (requiring timely disclosure to defendants of all exculpatory and mitigating information).[15] We note also that, as with defense attorneys, prosecutors can suffer from parallel conflicts of interest when they require defendants to waive their right to challenge those prosecutors' professional conduct; prosecutors should generally avoid circumstances in which their personal interests risk materially limiting their representation.[16]

In sum, it is generally detrimental to a self-regulated profession for a group of attorneys, even unintentionally, to place their possible misconduct beyond judicial review.[17] Consequently, prosecutors should not attempt to extract waivers of defendants' right to raise prosecutorial misconduct.[18] See ER 1.7(a)(2); ER 3.8 cmt. [1]; ER 8.4(d); ABA Standards for Criminal Justice, Standard 3-5.8(b) (2015) (prohibiting such waivers); Fl. Ethics Op. 12-01 (2012); Mo. Ethics Op. 126 (2009); N.C. Ethics Op. 129 (1993); Ohio Ethics Op. 2001-6. Consistent with the ABA, however, this opinion does not prohibit waivers "based upon past instances of [prosecutorial] misconduct that are specifically identified in the plea or sentencing agreement or transcript of the proceedings."[19]

CONCLUSION

It is unethical for a defense attorney to recommend and approve, and for a prosecutor to insist on, a criminal defendant's waiver of the right to seek review on the basis of either ineffective assistance of counsel or prosecutorial misconduct. Opinion 95-08 is accordingly withdrawn. We reiterate in closing that this opinion does not address (1) waivers of prosecutorial misconduct claims based upon past instancesofsuch conduct that are specifically identified in the plea or sentencing agreement or transcript of the proceedings and (2) waivers of ineffective assistance of counsel claims specifically identified and on which defendants receive independent representation.

Finally, we note that the interpretation of the Ethical Rules as applied to these waivers has evolved and that our previous Opinion 95-08 created confusion. This opinion should thus be read prospectively, not retroactively.

[1] Regardless of their state of licensure, federal prosecutors in Arizona generally must follow the Arizona Rules of Professional Conduct. See, e.g., LRCiv 83.2(e) ("The 'Rules of Professional Conduct,' in the Rules of the Supreme Court of the State of Arizona, shall apply to attorneys admitted or otherwise authorized to practice before the United States District Court for the District of Arizona."); LRCrim 57.13 (stating that Rule 83.2(e) governs attorneys in criminal practice); see also 28 U.S.C. § 530B(a) (2006) ("An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."); Ariz. R. Sup. Ct. 31(a) ("Any person or entity engaged in the practice of law or unauthorized practice of law in this state, as defined by these rules, is subject to this court's jurisdiction."); ER 8.5(a) ("A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.").

[2] For example, defendants have often had to waive:

any right to file an appeal, any collateral attack, and any other writ or motion that challenges the conviction, an order of restitution or forfeiture, the entry of judgment against the defendant, or any aspect of the defendant's sentence, including the manner in which the sentence is determined, including but not limited to any appeals under 18 U.S.C. § 3742 (sentencing appeals) and motions under 28 U.S.C. §§ 2241 and 2255 (habeas petitions), and any right to file a motion for modification of sentence. . . . The defendant acknowledges that this waiver shall result in the dismissal of any appeal, collateral attack, or other motion the defendant might file challenging the conviction, order of restitution or forfeiture, or sentence in this case.

[3] For example, defense attorneys have been asked to sign plea agreements containing the following acknowledgment:

I have discussed this case and the plea agreement with my client, in detail and have advised the defendant of all matters within the scope of Fed. R. Crim. P. 11, the constitutional and other rights of an accused, the factual basis for and the nature of the offense to which the guilty plea will be entered, possible defenses, and the consequences of the guilty plea including the maximum statutory sentence possible. I have further discussed the sentencing guideline concept with the defendant. No assurances, promises, or representations have been given to me or to the defendant by the United States or by any of its representatives which are not contained in this written agreement. I concur in the entry of the plea as indicated above and on the terms and conditions set forth in this agreement as in the best interests of my client. I agree to make a bona fide effort to ensure that the guilty plea is entered in accordance with all the requirements of Fed.R.Crim.P.11.

[4] Due in part to long-standing differences between state and federal law, state prosecutors generally do not request, and state courts generally do not enforce, such broad waivers. See generally Ariz. R. Crim. P. 32.2 (providing a right to file a post-conviction relief petition); cf.State v. Ethington, 121 Ariz. 572, 573, 592 P.2d 768, 769 (1979) ("[W]e think public policy forbids a prosecutor from insulating himself from review by bargaining away a defendant's appeal rights."); State v. Ward, 211 Ariz. 158, 165 n.5, 118 P.3d 1122, 1129 n.5 (Ct. App. 2005) ("In Arizona, a defendant cannot waive the constitutional right of appeal in a plea agreement."); see alsoMontgomery v. Sheldon, 182 Ariz. 118,

119, 893 P.2d 1281, 1282 (1995) ("There are good reasons for this rule. A defendant's right to appellate review is an essential safeguard against wrongful conviction. Absent a meaningful form of appeal, possible errors in the guilt determination of even pleading defendants would stand unchecked. Although there is less likelihood of error when a defendant voluntarily pleads guilty, experience shows that, as in all human endeavors, mistakes occur in plea proceedings.").

[5] See, e.g., United States v. Joyce, 357 F.3d 921, 922 (9th Cir. 2004) ("A defendant's waiver of his appellate rights is enforceable if the language of the waiver encompasses his right to appeal on the grounds raised, and if the waiver was knowingly and voluntarily made."); Washington v. Lampert, 422 F.3d 864, 871 (9th Cir. 2005) (concluding that waivers are unenforceable against challenges to voluntariness). With respect to enforcement, our opinion does not address substantive law; it addresses only the ethical responsibilities of attorneys practicing in Arizona.

[6] See, e.g., Dep't of Justice, Attorney General Holder Announces New Policy to Enhance Justice Department's Commitment to Support Defendants' Right to Counsel (Oct. 14, 2014), http://www.justice.gov/opa/pr/attorney-general-holder-announces-new-policy-enhance-justice-departments-commitment-suppoet; United States v. Kentucky Bar Ass'n, 439 S.W.3d 136, 140 (Ky. 2014) (upholding Kentucky legal ethics opinion over the Department of Justice's objections and concluding "that the use of IAC waivers in plea bargain agreements (1) creates a nonwaivable conflict of interest between the defendant and his attorney, (2) operates effectively to limit the attorney's liability for malpractice, and (3) induces, by the prosecutor's insertion of the waiver into plea agreements, an ethical breach by defense counsel"). The United States Attorney's Office for the District of Arizona has accordingly adjusted its standard plea agreement, adding the following line to its current waiver: "This waiver shall not be construed to bar a claim by the defendant of ineffective assistance of counsel."

[7] After we had drafted and circulated our initial opinion on these waivers, outgoing Attorney General Eric Holder rejected these waivers to the extent that they require defendants to waive their right to raise ineffective assistance of counsel claims. Thus, as a matter of current Department of Justice (DOJ) policy, federal prosecutors are no longer permitted to insist on waivers of ineffective assistance of counsel claims. Notwithstanding DOJ's recent policy change, we have nevertheless decided to publish our opinion because (1) DOJ policy, which explicitly rejects any "legal and ethical" problems with these waivers, could reauthorize such waivers at any point, (2) the policy does not address plea agreements that purport to waive prosecutorial misconduct claims, and (3) relying on the incomplete analysis in our prior ethics opinion on this issue (Op. 95-08), an individual state or federal prosecutor could include such a waiver in a plea agreement under the misimpression that such conduct is ethically permissible.

[8] ER 1.8(h)(1) bars a lawyer from "mak[ing] an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." This opinion does not revisit the question of whether ER 1.8(h) might apply because, as discussed below, other ethical rules clearly prohibit the waivers at issue.

[9] Independent counsel would not suffer from the conflicts of interest described above. See, e.g., ABA Standards for Criminal Justice, Standard 4-6.4(a) (2015) ("If a proposed [plea] agreement contains such a waiver regarding ineffective assistance of counsel, defense counsel should ensure that the defendant has consulted with independent counsel regarding the waiver before agreeing to the disposition.").

[10] The Alabama Ethics Committee put the problem succinctly:

the lawyer cannot simply refuse to explain such a [waiver] to the client as he has a duty under Rules 1.1 [Competence], 1.2 [Scope of Representation], and 1.4 [Communication] to thoroughly explain each and every provision of the agreement to the client. A lawyer must do so to ensure that the client is knowingly and voluntarily entering into the agreement. As such, a prosecutor may not require a criminal defendant to waive such rights as a condition of any plea deal since, in doing so, he would be "inducing" the defendant's lawyer into violating Rules 1.7(b) and 1.8(h) . . . or, would place the defendant into the untenable situation of either accepting counsel that has an inherent conflict of interest or proceeding without the benefit of counsel.

Ala. Ethics Op. 2011-02.

[11] As the ABA recently noted when denouncing such waivers:

Prosecutors should not require a defendant to waive the right to raise defense counsel's ineffectiveness as part of the terms of a waiver of appellate and post conviction claims. A prosecutor typically does not have, and should not be required to have, any sound factual basis to conclude that the defendant's counsel had, up to the signing of the plea agreement, provided effective assistance in the plea bargaining process. The prosecutor does not know to what extent defense counsel has investigated the case—both the facts and the applicable law, discussed the case and the plea offer with the defendant, explained the collateral consequences of a conviction and otherwise provided effective representation.

ABA House of Delegates Resolution and Report 113E (2013) (citing in part R. Michael Cassidy, Some Reflections on Ethics and Plea Bargaining,48 San Diego L. Rev. 93, 108 (2011) ("Insisting on so-called ineffective counsel waivers impresses me as overreaching of the worst sort and fundamentally inconsistent with a prosecutor's obligation as a minister of justice.")).

[12] See, e.g., id. ("It is especially problematic that the prosecutor includes in the plea agreement a provision that requires the defendant to waive any ineffectiveness by defense counsel occurring after the plea bargain is accepted by the court. Defense counsel's ineffectiveness at sentencing or ineffectiveness in challenging the breach of the plea agreement by the prosecutor should not be immune from a later challenge by the defendant. In such circumstances, defense counsel's deficient performance could not have been anticipated or predicted by either the defendant or the prosecutor. . . . The Standards for the Prosecution and the Defense Function suggest that defense attorneys should not accept plea bargains that include waivers of 'important defense rights' and prosecutors should not routinely require such plea waivers.").

[13] See generally Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) ("The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.").

[14] See, e.g., Connick v. Thompson, 131 S. Ct. 1350, 1356 n.1 (2011) (noting that prosecutor knowingly failed to disclose exculpatory blood-type evidence); In re Peasley, 90 P.3d 764, 772-73, 779 (Ariz. 2004) (disbarring prosecutor because he permitted false testimony in a capital prosecution); see also generally ABA Standards for Criminal Justice, Standard 3-5.8(b), (e) (2015) ("A prosecutor should not suggest or require, as a condition of a disposition agreement, any waiver of post-conviction claims addressing ineffective assistance of counsel, prosecutorial misconduct, or destruction of evidence" or "waivers to hide an injustice or material flaw in the case which is undisclosed to the defense.").

[15] See also Fl. Ethics Op. 12-1 (2012) ("The Committee believes that the vast majority of prosecutors act in good faith and would not intentionally commit misconduct. However, some prosecutorial misconduct can occur unintentionally and, in the rare instance, even intentionally. Prosecutorial misconduct may be known only to the prosecutor in question, e.g., when the prosecutor has failed to disclose exculpatory information. The Committee's opinion is that it is prejudicial to the administration of justice for a prosecutor to require the criminal defendant to waive claims of prosecutorial misconduct when the prosecutor is in the best position, and indeed may be the only person, to be aware that misconduct has taken place.").

[16] ER 1.7(a)(2); see also Standards for Criminal Justice: Prosecution Function Standard 3-1.3(a) (1993) ("A prosecutor should avoid a conflict of interest with respect to his or her official duties."); id. Standard 3-1.3(f) ("A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests."); Nat'l Prosecution Standards Standard 1-3.3(d) (Nat'l Dist. Att'ys Ass'n 2009) (noting that a prosecutor should "excuse himself or herself from any investigation, prosecution, or other matter where personal interests of the prosecutor would cause a fair-minded, objective observer to conclude that the prosecutor's neutrality, judgment, or ability to administer the law in an objective manner may be compromised."). The United States Attorney's Manual analogously notes that prosecutors whose misconduct is in issue should generally recuse themselves (absent official consent). U.S. Dep't of Justice, United States Attorneys' Manual § 1-4.130(A)–(B) (1997) ("Before any pleading or other document concerning any non-frivolous allegation of serious misconduct is filed, whether in the district court or on appeal, it must be reviewed by a supervisor who is not implicated by the allegation," and "[a] Department attorney who is found to have engaged in misconduct shall not represent the United States in litigation concerning the misconduct finding, unless approval is obtained from the responsible United States Attorney or Assistant Attorney General.").

[17] Cf.State v. Ethington, 121 Ariz. 572, 573, 592 P.2d 768, 769 (1979) ("[W]e think public policy forbids a prosecutor from insulating himself from review by bargaining away a defendant's appeal rights."). Although defendants may still complain to the disciplinary authorities about prosecutorial

misconduct, defendants are not typically incentivized to do so (as they generally seek judicial relief, not vindication of the legal profession's ethics). Moreover, without a court finding of prosecutorial misconduct, the misconduct is less likely to result in discipline or civil liability.

[18] We note that some prosecutorial offices already explicitly except prosecutorial misconduct claims from their waiver provisions. See, e.g., Susan R. Klein et al., Waiving the Criminal Justice System: An Empirical and Constitutional Analysis, 52 Am. Crim. L. Rev. 73, 87 (2015) ("Fourteen of the eighty-eight districts that require waivers of appellate rights only, and seventy-seven districts that include waivers collateral attacks, provide an exception for prosecutorial misconduct."). For example, in the Western District of Texas, when a prosecutor asks a defendant to waive the right to bring a later habeas corpus petition, the waiver includes the following exception: "'the defendant does not waive his right to raise a challenge based on ineffective assistance of counsel and prosecutorial misconduct.'" Id. at 84.

[19] ABA House of Delegates Resolution and Report 113E (2013) (resolving that "the American Bar Association opposes plea or sentencing agreements that waive a criminal defendant's post-conviction claims addressing ineffective assistance of counsel, prosecutorial misconduct or destruction of evidence" and urging courts to reject such waivers). The accompanying report notes that "[w]ith an astronomically high percentage of criminal cases decided by pleas of guilty, the routine use of the guilty plea waivers of ineffective assistance of counsel, prosecutorial misconduct and destruction of evidence has the effect of insulating the guilty plea process from appellate court scrutiny and public awareness and should not be tolerated unless the claims based upon past conduct and are specifically identified in the plea or sentencing agreements or in the transcript of the proceedings." Id. The revised ABA Standards for Criminal Justice are consistent. ABA Standards for Criminal Justice, Standard 3-5.8(b) (2015) ("A prosecutor should not suggest or require, as a condition of a disposition agreement, any waiver of post-conviction claims addressing ineffective assistance of counsel, prosecutorial misconduct, or destruction of evidence, unless such claims are based on past instances of such conduct that are specifically identified in the agreement or in the transcript of proceedings that address the agreement.").

State Bar of Arizona Ethics Opinions

04-04: Conflicts of Interest; Public Defenders; Screening; Disqualification; Imputed Disqualification

6/2004

Under revised Ethical Rule 1.10 a separate "Conflicts Unit" may not be employed to address imputed conflicts involving former clients even if screening is employed as defined under ER 1.0. Two current clients may give a written informed waiver of a conflict under certain circumstances in accordance with ER 1.7. If both clients do not give consent, however, the Public Defender's office and the proposed Conflicts Unit would constitute one firm for purposes of ER 1.10, such that referral of a case to the Conflicts Unit would not resolve the ethical conflict.

FACTS[1]

In Maricopa County, there are three public defender offices. When one office has a conflict in a case, such as current or prior representation of a co-defendant, victim or witness, the case is transferred to one of the other offices. When all three offices have conflicts in a case, the case is assigned to a private attorney who contracts with the county. Transferring a case to a contract attorney increases the cost to defend it.

To control the cost of death penalty defense, Maricopa County would like one or more of the three public defender offices to create a separate unit to handle cases where all three staffed offices have conflicts. This unit would be "screened" from all of the office's other cases. The unit would be housed in a separate location from the office, and neither the unit nor the office would have access to the other's computer records or files. The attorneys and staff in the Conflicts Unit would be prohibited from discussing cases with attorneys and staff in the Public Defender's office. Both offices would share a director and administrative staff (payroll), procurement, human resources, etc., but nothing else.

QUESTION PRESENTED

Under the ethics rules adopted by the Arizona Supreme Court effective December 1, 2003, is it permissible for a public defender office to create a separate unit to handle conflict cases if the unit is "screened" from any confidential information in the possession of the office pertaining to the conflicting cases?

RELEVANT ETHICAL RULES

ER 1.0 Terminology

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. Whether government lawyers should be treated as a firm depends on the particular Rule involved and the specific facts of the situation.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

ER 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client gives informed consent, confirmed in writing, and:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

ER 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by ERs 1.6 and 1.9 (c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

ER 1.10 Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by ERs 1.7 or 1.9 unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interest materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by ERs 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in ER 1.7.

(d) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under ER 1.9 unless:

(1) the matter does not involve a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role;

(2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by ER 1.11.

* * *

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association; or lawyers employed in the legal department of a corporation or other organization. See ER 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts.

* * *

Principles of Imputed Disqualification

[5] ER 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate ER 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by ERs 1.6 and 1.9(c).

[6] ER 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in ER 1.7. The conditions stated in ER 1.7 require the lawyer to determine that the representation is not prohibited by ER 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, *see* ER 1.7, Comment [21]. For a definition of informed consent, *see* ER 1.0(e).

* * *

RELEVANT ARIZONA ETHICS OPINIONS

89-08 (the Public Defender's Office should be considered a "firm" for purposes of ER 1.10.)

91-12 (contract between County Attorney and City Attorney authorizes the City Attorney to handle some of the County Attorney's misdemeanor criminal cases. The contract provides that the County Attorney has the power to unilaterally terminate the contract. To the extent that the exercise of this power requires the County Attorney to review any confidential information relating to the misdemeanor prosecutions performed by the City Attorney, the County Attorney's Office and the City Attorney's Office are one "firm" for purposes of ER 1.10.)

92-06 (ethical propriety of a public defender's continued representation of a client, where the client's defense is to inculpate a co-defendant whom the Public Defender's Office was appointed to represent in the early stages of the same case and also in another proceeding.)

92-07 (screening of Deputy Public Defenders is not an adequate remedy for conflict under ER 1.7)

93-06 (question of whether a public defender's office may split into two divisions in order to avoid

imputed disqualification problems is answered in the negative.)

OPINION

A virtually identical question was addressed by the Committee before the rule changes to the Rules of Professional Conduct, effective December 1, 2003. In Opinion 93-06, a Public Defender's office proposed that attorneys, investigators, and secretaries for a new division would maintain an office separate from the main office which, though physically separate, would be administered through the Public Defender. The Committee addressed whether this resulted in an imputed disqualification under ER 1.10. In determining that there was an imputed disqualification, this Committee cited Opinion 89-08 and other authority in determining that the Public Defender's office should be considered a "firm" for purposes of ER 1.10. Opinion 93-06 then analyzed whether screening mechanisms would be adequate to prevent dissemination of confidential information. Under the then-existing Ethical Rules, the Committee concluded that screening was not an adequate remedy for a conflict of interest under ER 1.7, related to current clients. *See also* Opinion 92-07 (screening of deputy public defenders for adverse clients would not be solution for conflict of interest). The Committee noted that the conflict of interest prohibition of ER 1.7 is to assure clients of the lawyer's undivided loyalty and does not require a showing that confidential information has actually been shared or even that other lawyers in the firm have access to it. The Committee therefore concluded that the imputed disqualification principles of ER 1.10 would apply unless the County established a separate office with "no ties" to the Public Defender, such that the separate office was sufficiently separate both in operation and management that it would constitute a separate "firm" within the meaning of ER 1.10.

According to the inquiry here, the new "Conflicts Unit" would be screened from the office's other cases such that the "Conflicts Unit" would not have access to the main computer records or files, and would be prohibited from discussing cases with the attorneys and staff of the other offices. Some have interpreted Revised ER 1.10 as now providing for screening to alleviate conflicts involving former clients. The operative language of ER 1.10(d) provides that "[w]hen a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent the person in the matter in which that lawyer is disqualified under ER 1.9 unless . . ." One interpretation of the "when a lawyer becomes associated with the firm" phrase is that screening is appropriate after or whenever lawyers are associated with a firm. Under this interpretation, screening would be an appropriate mechanism under ER 1.9 in all cases involving conflicts involving former clients. The operative language, however, also uses the word "becomes." This suggests that the screening mechanism is appropriate only in circumstances in which a lawyer representing the former client joins a new "firm." In this case, the Reporters Explanation of Changes for the ABA's "Ethics 2000" are instructive. Although the Reporters Explanation is not part of the official comment adopted by the ABA, they reflect that the intent of modified ER 1.10 was to address the situation of a lawyer moving laterally between firms to promote lawyer mobility:

3. Paragraph (c): Screening of lateral hires

A number of jurisdictions now provide that former-client conflicts of lawyers who have moved laterally are not imputed to the new law firm if the personally disqualified lawyer has been timely screened from participation in the matter and the former client is notified of the screen. The Commission is recommending that current Rule 1.10 be amended to permit nonconsensual screening of lawyers who have joined a law firm.

Model Rule 1.10 Reporter's Explanation of Changes.

Consistent with the intent of the drafters and the use of the word "becomes" the Committee concludes that the screening mechanism of ER 1.10 is only appropriate in circumstances in which a new or lateral hire has represented a former client, and may not be employed in circumstances involving a former client when the lawyer was already a member of the "firm."

The other related issue involves current clients under ER 1.7. Of note, ER 1.7(b) provides that two current clients may waive the existence of a conflict of interest if each client gives informed consent in writing and the additional requirements of ER 1.7(b) are met.[2] As set forth above, this Committee previously concluded that screening is not an adequate remedy if consent to waive the conflict is not obtained. Moreover, the amendments to ER 1.10 reflect that screening is appropriate only for cases involving past clients. Therefore, with respect to current clients who do not provide informed consent, the question becomes whether the separate division is considered the same "firm" for purposes of ER 1.10.

Moreover, as stated in Opinion 89-08 "a lawyer in a position of ultimate authority and oversight may acquire confidential information about all, or nearly all, of the cases handled by the office during his or her tenure." Indeed, it would be difficult to imagine how the Public Defender could effectively oversee the "Conflicts Unit" without acquiring some information about individual case files. In this regard, this Committee stated in Opinion 91-12 that the mere power of the County Attorney's office to review the "workload" of the City Attorney would make the County Attorney's office and the City Attorney's office one firm for purposes of ER 1.10. Our Opinion 93-06 stressed the need for both offices to be separate in operation and in management for purposes of ER 1.10.

The fact that both the Public Defender's office and the "Conflicts Unit" share a director and administrative staff means that the two should be considered the same "firm" for purposes of ER 1.7 conflicts of interest. The Committee's Opinion 93-06 indicated that to avoid being considered one "firm" each office would need to have "no ties" to the other office. As indicated in Opinion 93-06, in the context of indigent criminal defense a client's trust and faith in their attorney is essential to the proper administration of criminal justice. "Persons charged in crime must have ultimate faith in their attorney and such faith may be slow to develop when the attorney is court-appointed and not retained. Without faith in counsel, the criminal defendant may not freely communicate information necessary to an adequate defense." Opinion 93-06 (*quoting Rodriguez v. State*, 129 Ariz. 67, 73, 74, 628 P.2d 950, 956-57). This trust and confidence may be undermined if clients, particularly unsophisticated clients, are represented by separate physical offices sharing a director and

administrative staff. *See also* opinion 91-12 (the ability of the County Attorney to review confidential information pertaining to misdemeanor prosecutions performed by the City Attorney under contract makes the County Attorney's office and City Attorney's office one "firm" for purposes of ER 1.10). Moreover, even though the screening applicable to lawyers is typically effective, it is not difficult to imagine the inadvertent disclosure of some information protected by ER 1.6 by non-lawyer staff.

CONCLUSION

Under revised Ethical Rule 1.10 a separate "Conflicts Unit" may not be employed to address imputed conflicts involving former clients even if screening is employed as defined under ER 1.0. Two current clients may give a written informed waiver of a conflict under certain circumstances in accordance with ER 1.7. If both clients do not give consent, however, the Public Defender's office and the proposed Conflicts Unit would constitute one firm for purposes of ER 1.10, such that referral of a case to the Conflicts Unit would not resolve the ethical conflict.

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[1] Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. © State Bar of Arizona 2004

[2] We do not address in this opinion the circumstances in which it is appropriate for a client to give or for a lawyer to even suggest a waiver of a conflict. There are undoubtedly circumstances in which a lawyer should not even request waiver under ER 1.7 or ER 1.9. Also, as discussed above, there may be circumstances in which, following a knowing waiver confirmed in writing, members of the same firm may institute screening procedures with the consent of the clients. This opinion does not address that situation, but rather addresses the screening mechanism addressed in ER 1.10 that occurs without client consent.

State Bar of Arizona Ethics Opinions

01-12: Conflict of Interest; Criminal Representation; Public Defenders; Disqualification; Social Relationships

11/2001

This Opinion discusses the possible conflicts of interest when a public defender and law enforcement officer have a personal relationship.

FACTS[1]

An Assistant Public Defender ("APD") is involved in a romantic relationship with a law enforcement officer (the "Officer"). The Officer has been an investigating, arresting officer and/or witness in several cases involving the clients of the Public Defender's Office. The APD and Officer are in job assignments where they would ordinarily share information about their cases with their respective co-workers. The supervisor of the APD seeks guidance on the ethical guidelines that apply to this situation.

QUESTION PRESENTED

What are the ethical guidelines that govern the situation where an Assistant Public Defender is involved in a romantic relationship with a law enforcement officer who is often an arresting or investigating officer in cases involving the clients of the Public Defender's Office?

RELEVANT ETHICAL RULES

ER 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c) and (d) or ER 3.3(a)(2).

* * * *

ER 1.7. Conflict of Interest: General Rule

* * * *

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

ER 1.10. Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by ER 1.7, 1.8(c), 1.9 or 2.2.

* * * *

RELEVANT ARIZONA ETHICS OPINIONS

Ariz. Ops. 82-15, 2001-10

OPINION

In Ariz. Op. 2001-10, the Committee considered the situation where two attorneys are romantically involved, and one works as a prosecutor while the other a public defender. The issue presently before the Committee is different, as it involves an attorney and a law enforcement officer, not two attorneys. The law enforcement officer is clearly not bound by the Rules of Professional Conduct governing lawyers. Still, some of the analysis regarding the potential for conflict for the involved attorney is similar to that contained in Ariz. Op. 2001-10.

There are no prior Arizona Opinions directly on point, and there is not an Ethical Rule that directly addresses the situation where a witness in a case is romantically involved with one of the lawyers. The issue falls under the general conflict of interest rule in ER 1.7(b) and the general duty to maintain client confidences under ER 1.6. Three related levels of inquiry are appropriate: First, does ER 1.7 preclude representation by the APD or any other member of the Public Defender's Office? Second, what special considerations, if any, are appropriate under ER 1.6 concerning client confidences? Third, when, if ever, is client disclosure and consent required?

Conflicts under ER 1.7 and Imputation under ER 1.10

Under ER 1.7(b), the relevant inquiry is whether the dating relationship could materially limit the representation of the client. If so, the APD must determine whether the romantic relationship would adversely affect the representation. If it would, there is a non-waivable conflict; if it would not, disclosure and consent by the client are possible under ER 1.7(b). It is not difficult to imagine a situation where the Officer takes the stand to testify against the accused, followed by cross-examination of the APD, followed by re-direct examination in which the prosecutor uses the romantic relationship to either bolster the Officer's testimony or weaken the cross-examination. In cases where the Officer is a testifying witness, and the APD is counsel for the accused, the potential for conflict under ER 1.7(b) will be very great. Indeed, the Committee believes that in most, if not all, situations where the APD is defending and the Officer is anticipated to be a testifying witness, the representation likely would be adversely affected by the romantic relationship, and a non-waivable conflict would exist. Because determination of this issue turns on the facts of any given case and relationship, however, the Committee is not adopting a bright-line rule on this point. Factors to consider in determining whether the representation would be adversely affected by the relationship include: 1) the nature and duration of the romantic relationship; 2) the nature of the charges at issue; and 3) the nature of the anticipated testimony of the Officer, including the materiality of the issue to which the Officer is expected to testify, and whether the anticipated testimony is disputed.

In cases involving the Officer and in which another member of the Public Defender's Office is involved, the potential for conflict under ER 1.7(b) will be far less than when the APD is involved, but the potential is still real. Thus, in each case involving the Officer, the Public Defender's Office must evaluate whether the romantic relationship between the Officer and the APD will materially limit the defense of the client.

Whether a conflict under 1.7(b) resulting from the romantic relationship should be imputed to the entire Public Defender's Office under ER 1.10(a) raises some interesting issues. Arizona courts arguably have been inconsistent in addressing the application of ER 1.10 to public defender offices. *Compare Okeani v. Superior Court*, 178 Ariz. 180, 182, 871 P.2d 727 (App. 1994) with *State v. Sustaita*, 183 Ariz. 240, 243, n. 2, 902 P.2d 1344 (App. 1995). For the present inquiry, the Committee concludes that a conflict created by a "lawyer's own interests" under ER 1.7(b) should not be imputed to the entire Public Defender's Office under ER 1.10. To find such an imputation could arguably lead to absurd results where the "lawyer's own interests" are the result of personal, religious, social, political, or familial issues. For example, if one public defender determines that her representation of a certain defendant accused of a felony hate crime would be materially limited by her attendance at the place of worship at issue, that potential conflict under ER 1.7 is not a conflict that should be imputed under ER 1.10. Likewise, if one public defender determines that his representation of a defendant would be materially limited because the defendant is accused of sexually assaulting the APD's relative, that is not a conflict that should be imputed under ER 1.10. These are but two examples that support our conclusion that if the conflict under ER 1.7 is a personal conflict relating not to another client but to the lawyer's personal "own interests" it should not be imputed to others.[2]

Thus, in this Opinion the Committee need not settle the apparent split of authority in Arizona over whether ER 1.10 applies as a legal matter to the Public Defender's Office. Rather, the Committee concludes that irrespective of its application, a conflict under ER 1.7(b) arising from a lawyer's personal "own interests"—such as a dating relationship with a law enforcement officer—is not the type of conflict that should be imputed to an entire Public Defender's Office.

The Duty to Maintain Client Confidences under ER 1.6

With regard to the duty to maintain client confidences pursuant to ER 1.6, for each case in which the Officer is involved, the Public Defender's Office should consider the likelihood that confidential information could be inadvertently shared or revealed. According to the facts presented to the Committee, the APD is in a job assignment where he or she would ordinarily share information about cases with co-workers. Inadvertent disclosure to a spouse or significant other where married lawyers are opposite one another in the same case was addressed in Ariz. Op. 82-15 (prior to enactment of the Ethical Rules), in which the Committee explained:

> It must be recognized that the relationship of husband and wife is so close that the possibility of an inadvertent breach of a confidence or the unavoidable receipt of information concerning the client by the spouse other than the one who represents the client (for example, information contained in a telephoned message left for the lawyer at home) is substantial.

Ariz. Op. 82-15 at 6.

The reasoning of Ariz. Op. 82-15 applies here. In a romantic relationship, the possibility of inadvertent disclosure is likewise great. In some cases, to ensure client confidences are preserved, the Public Defender's Office may decide to take precautions to prevent the inadvertent disclosure of information to the Officer. Precautions may include "screening" off the APD in certain cases.[3] Procedures for screening off the APD may include advising all members of the office to refrain from discussing the case in his or her presence, marking the files appropriately, and other appropriate measures, depending upon the inner-workings of the office. We create no bright-line rule on whether such procedures are necessary in any given case, and instead believe that their application will likely vary depending on the situation.

Whether Disclosure and Consent Are Required

Finally, with regard to whether the client must be advised of the dating relationship with the Officer (in the absence of a direct conflict, which would always require disclosure), we are guided by prior Ariz. Op. 82-15, which provides:

> [T]he Committee also finds that it is a matter of individual judgment, guided, of course, by the Ethical Considerations and Disciplinary Rules of the Code of Professional Responsibility, whether a lawyer-spouse or his partners or associates must disclose the marital relationship to a client when a partner or associate of the other spouse represents an adverse interest.

Ariz. Op. 82-15 at 6.

We recently applied such reasoning in Ariz. Op. 2001-10. The Committee concludes that disclosure is not mandatory where neither the Officer nor the APD is involved in the case. If the Officer and the APD are both involved in the case, the Committee concludes that disclosure is necessary. *See* discussion of 1.7(b) above.[4] We find it unlikely, but still possible, that disclosure would be required in a case in which the APD is not involved. Other than the mandatory disclosure where the APD and Officer are both involved, the decision of whether to disclose should be determined on a case-by-case basis. The following factors should guide the APD (and the Public Defender's Office) in determining whether and when disclosure is warranted: 1) the number of attorneys in the office; 2) the physical setting; 3) the allocation of duties and responsibilities; 4) the likelihood of inadvertent disclosure of client confidences; 5) the seriousness of the romantic relationship; and 6) the degree of involvement by the Officer (e.g. investigating officer vs. arresting officer vs. witness). If the APD concludes that disclosure is appropriate, subject to the discussion above concerning a non-waivable conflict, continued representation of the client can occur if the client consents under ER 1.7(b), and the lawyer reasonably believes the representation will not be adversely affected.

CONCLUSION

When an APD is romantically involved with an Officer who is regularly involved in investigating and arresting clients of the Public Defender's Office, the following rules and guidelines exist:

- Where the APD and the Officer are both involved in a case, and the Officer is expected to testify, in most, if not all, cases a non-waivable conflict will exist. Because this is a factual determination, the Committee declines to adopt a bright-line rule, but provides the following factors that should be considered in determining whether the conflict is waivable (with disclosure and consent) under ER 1.7(b): 1) the nature and duration of the romantic relationship; 2) the nature of the charges at issue; and 3) the nature of the anticipated testimony of the Officer, including the materiality of the issue to which the Officer is expected to testify, and whether the anticipated testimony is disputed.

- Where the APD and Officer are both involved in a case, regardless of whether the Officer is expected to testify, disclosure of the romantic relationship and consent by the client are required under ER 1.7(b).

- In all other cases, the APD and the Public Defender's Office must determine on a case-by-cases basis, *whether*: 1) the romantic relationship places a material limitation on the representation of the client and therefore creates a conflict under ER 1.7(b) for the APD; 2) procedures should be put in place to prevent the inadvertent disclosure of confidential client information to the Officer in violation of ER 1.6; and 3) the client should be informed of the romantic relationship pursuant to ER 1.7 and offered the option of either: a) consenting to the continued representation; or b) requesting the appointment of another public defender. There are no bright-line rules for answering each of these levels of inquiry, but provided in this Opinion are guidelines to help the APD and the Public Defender's Office in answering each question on a case-by-case basis.

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[1] **Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. © State Bar of Arizona 2001**

[2] The reasoning behind this conclusion is supported by the rule governing the situation in which married lawyers work in firms on opposing sides of the same case; a "disqualification [under] ER 1.8 (i) is personal and is not imputed to members of firms with whom the lawyers are associated." *See* Comment to ER 1.8(i). It would make little sense to impute a conflict created by a personal romantic relationship between a public defender and law enforcement officer to the entire Public Defender's Office, when a married relationship between a public defender and a prosecutor is a disqualification expressly not imputed to other members of the lawyers' offices.

[3]While "walling off" attorneys cannot cure an actual conflict and is not an acceptable alternative to informed consent for conflicts, *see Towne Dev. of Chandler, Inc. v. Superior Court*, 173 Ariz. 364, 842 P.2d 1377 (Ct. App. 1993), it may be an acceptable approach in attempting to prevent inadvertent disclosure of privileged information.

[4] This seems clear if one asks the following question: "If I were a defendant accused of a crime and represented by a public defender, would I want to know that my counsel was romantically involved with the police officer that is involved in the case?"

State Bar of Arizona Ethics Opinions

98-01: Confidentiality; Disclosure; Court Orders; Public Defenders 1/1998

A public defender ethically may disclose information requested on a court initial status report regarding certain information about meeting with the defendant, production of discovery, and review of plea offers. [ERs 1.2, 1.3, 1.6, 3.3, 3.8, 8.4]

FACTS[1]

A public defender requested an opinion concerning the ethical propriety of compliance with criminal pretrial conference reporting requirements imposed by the superior court. The court promulgated a Defendant Initial Status Report that asks the attorney assigned to the case to submit a signed written statement disclosing the following:

1. Date of first client meeting;
2. Whether defendant is in custody;
3. Whether interpreter services are required;
4. Whether the prosecution's discovery has been received;
5. Whether discovery has been provided to the prosecution;
6. Whether a plea offer has been received;
7. Whether the plea offer was reviewed with defendant;
8. Whether and, if so, when the case should be set for change of plea; and
9. When the case will be prepared for trial and, if delay of more than 60 days is requested, if waiver of Rule 8 rights had been discussed with defendant.

QUESTION PRESENTED

1. Is any of the other information requested in the Defendant's Initial Status Report confidential under ER 1.6?

2. May a criminal defense attorney ethically disclose the information requested in the Report?

RELEVANT ETHICAL RULES

ER1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

* * * * *

ER1.2 Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation...In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

* * * * *

ER1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

* * * * *

ER1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c) and (d) or ER 3.3(a)(2).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal the intention of his client to commit a crime and the information necessary to prevent the crime.

(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceedings concerning the lawyer's representation of the client.

* * * * *

ER 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) except as required by applicable law, fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

* * * * *

ER 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

* * * * *

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing,

disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

* * * * *

ER 8.4 Misconduct

It is a professional misconduct for a lawyer to:

* * * * *

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

OPINION

Duties of a lawyer as legal advisor, officer of the court system and a public citizen are often fully consistent and harmonious. The distinct roles may, however, be in conflict at times.

> The Rules of Professional Conduct are rules of reason.
>
> They should be interpreted with reference to the purpose
>
> of legal representation and of the law itself.

* * * * *

> The rules presuppose a larger legal context shaping the
>
> lawyer's role. That context includes court rules and
>
> statutes relating to matters of licensure, laws defining
>
> specific obligations of lawyers and substantive and procedural law in general. Rules of Professional Conduct,

Preamble-Scope. Ariz. R.S.Ct. 42.

"Confidentiality" is given effect both through the evidentiary principle of attorney-client privilege and the Rules of Professional Conduct. Attorney-client privilege may apply in formal proceedings if the attorney is called to testify or otherwise produce evidence. The ethical rule of client-lawyer confidentiality requires the attorney to hold inviolate matters communicated in confidence by the client as well as other information that relates to the representation. The present inquiry asks Committee direction as to whether compliance with the aforementioned pre-trial disclosure requests would violate the lawyer's ethical duty of confidentiality. The Statement of Jurisdictional Policies of this Committee, however, precludes rendering an opinion as to any pure question of law. Thus, the Committee cannot opine as to the extent or application of the evidentiary attorney-client privilege and it cannot opine as to the efficacy or enforceability of any specific court rule or order. Where there is a mixed question of law and ethics, the Committee will consider the legal issue, such as "attorney-client privilege," in order to respond to the ethical issue of violating confidentiality.

At issue in this inquiry is the apparent conflict between the ethical obligations owed by a public defender to his client and to the court. To assess the proper application of ethical standards it is appropriate to begin with the basic philosophical framework which has been established for the ethical practice of law.

> A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
>
> * * * * *
>
> As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under

> the rules of the adversary system.
>
> * * * * *
>
> In all professional functions a lawyer should be compliant, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.
>
> * * * * *
>
> A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process. Preamble, Rules of Professional Conduct, Ariz. R.S.Ct. 42.

The ethical duty of confidentiality is not limited to the revelations of a client directly to his counsel. The principle encompasses any and all information, regardless of source, that comes to the attorney in relation to the representation of the client. ER 1.6(a), Ariz. R.S.Ct. 42. The instant ethics inquiry requires analysis as to whether compliance with the Defendant's Initial Status Report requirements would constitute ethically impermissible disclosures of confidential client information. This Opinion addresses each of the form's inquiries in turn.

First is the question about when counsel first met with the client. The date of the criminal defendant's first meeting with his public defender would be encompassed within the classification of "information relating to representation" ER 1.6(a). It is to be expected that clients would seek legal advice to clarify their rights and endeavor to avoid violating legal standards. In some instances involving retained criminal defense counsel, disclosure of the date of first meeting with an attorney might well weaken a client's claim to ignorance of some legal requirement. Inviolate confidentiality may encourage early and open pursuit of legal advice. A public defender is, however, appointed to provide legal representation after alleged criminal activity has been perpetrated and formal criminal proceedings have been undertaken against a defendant. Ariz. R. Crim. P. 6.1, 17 A.R.S. § 62. Inquiry by the court as to whether an accused has been afforded an opportunity to directly confer with appointed counsel would seem to constitute a valid basis of inquiry before setting criminal proceedings for trial. Consequently, disclosure of this information would be "impliedly authorized in order to carry out the representation," under ER 1.6(a).

Next, the superior court form asks if the defense has been given access to pre-trial discovery from the prosecution. The defendant is legally and ethically entitled to timely disclosure of material evidence. ER 3.8(d), Ariz. R.S.Ct. 42; R. Crim. P. 15.1, 17 A.R.S. § 282; State v. Gulbrandson, 184 Ariz. 46, 906 P.2d 579 (1995). If a plea offer has been made, the status report asks whether the plea offer has been reviewed with the defendant by his attorney. Court handling of and the necessary schedule commitment to a negotiated plea agreement would significantly differ from handling of a trial. (The court would have to determine whether a criminal defendant understands and agrees to a plea agreement and whether the agreement should be accepted or rejected. Ariz. R. Crim. P. 17.4, 17 A.R.S. § 407.) Knowledge of the status of discovery and plea negotiations would be indispensable to the administrative demands of efficient court functioning.

The superior court form further asks defense counsel to declare that the case will be prepared and ready for trial within a designated number of days. The form states that, if more than sixty days for trial preparation is requested, defense counsel should both explain the reasons for requiring additional time and state whether discussion has been had with the client regarding waiver of the constitutional right to speedy trial. Const. Art. II, §

24; 1 A.R.S. § 413; Ariz. R. Crim. P. 8.3., 17 A.R.S. § 100. Finally, the Initial Status Report form asks whether the defense has provided discovery to the prosecution.

All of the form's inquiries pertain to the specifics of when a public defender met with the client, whether discovery was obtained form the prosecution and whether the defendant was made aware of the right to a speedy trial. All of these are clearly matters properly classifiable as "information related to representation" within contemplation of ER 1.6(a). Thus, all of the information is "confidential" under the Ethical Rules. The analysis then becomes, may the confidential information nevertheless be disclosed.

There are several exceptions to the restrictions upon the use or disclosure of confidential client information. A most basic exception is that a client may waive the confidentiality right. Professional Responsibility, 3rd ed., R Rotunda, West Pub. Co., (1992). Necessarily the consent would be effective only if voluntarily given after the client was adequately informed to allow understanding of the effect of the waiver. A lawyer is not permitted to either use or disclose confidential client information as to adversely affect a material interest of the client or in violation of client directives. Restatement of the Law, the Law Governing Lawyers, Third Ed., Tentative Draft No. 3, § 111, (1990).

Some other disclosures of confidential client information under the Ethical Rules would either be permitted or required in specific situations. See, ER 1.6, Comment 20. See also, ER 2.2, 2.3 and 3.3. None of those exceptions, however, is relevant to the factual scenario presented by the instant inquiry. Instead, the analysis of the propriety of the requested disclosures to the court for pretrial status is dependent upon implied consent. The relevant text of ER 1.6(a) refers to "disclosures impliedly authorized in order to carry out the representation." The Comment to ER 1.6 specifically identifies examples of impliedly authorized disclosures. These include "admitting a fact that cannot properly be disputed or in negotiation by making a disclosure that facilitates a satisfactory conclusion." The Comment to ER 1.6 also states that the Rules of Professional Conduct permit or require lawyer disclosures of information relating to representation in various circumstances. See, ER 2.2, 2.3, 3.3 and 4.1. "In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client." ER 1.6, Comment. See also, Opinion No. 87-03 (disclosure to I.R.S. of client's large cash payment).

The involved superior court form asks for the disclosure of specific information by counsel for the criminal defendant. The inquiries seek information that was learned by the lawyer during the course of her representation of the client. Nonetheless, the court form does not ask revelation of specifics of any consultation between the lawyer and the client. The court has not asked about the available evidence. The inquiry does not probe into the thought processes at work in developing the case for trial. To the contrary, the superior court form inquires about the time period during which the defendant has had access to appointed criminal defense counsel. In the same vein, the court form asks whether discovery compliance has been given and received. The court has asked whether a plea agreement was offered and, if so, whether the defendant has been afforded the opportunity to respond. Counsel for the defendant has also been asked to identify the period of any additional time required to complete trial preparation. If a lengthy delay is requested by defense counsel, the court wants to learn whether the defendant has knowingly waived the constitutional right to a speedy trial.

It is clear that the mandatory superior court pre-trial status report is not designed to seek disclosure of confidential client information that would adversely affect the material interests of the criminal defendant. See, Restatement, Law Governing Lawyers, § 111. The court form seeks status information regarding the client's access to counsel, discovery progress in case preparation, whether a plea is pending and how close the matter is to being prepared for trial.

A lawyer as an agent for her client may either use or disclose confidential client information in the course of representing the client. Restatement of the Law, 3rd ed., Tentative Draft No. 3 (1990), § 113, 28-30. Certainly, the client and counsel may specifically define the scope of legal representation. Yet, to the extent not inconsistent with the interests of the client, it is contemplated that use or disclosure of information may be essential to further the aims of the client in the representation. "The lawyer's authority to act in the client's behalf derives from the special agency responsibility that the lawyer undertakes and the special agency power the clients normally expect lawyers to exercise when the client agrees that the lawyer is to act in the client's behalf." Restatement, § 113, Comment (b), 30. An explicit grant of permission would not be required. The lawyer would be legally authorized because she serves in a representational capacity to take action on behalf of the client.

In addition, the general rule of confidentiality of client information may not preclude disclosure that is required either by law or by court order. Reciprocal discovery compliance is envisioned by Ariz. R Crim. P. 15. There is a legal duty to disclose evidence in preparation for criminal trial proceedings. The courts have inherent power, if due administration of justice requires, to order discovery of evidence. State v. Wallace, 97 Ariz. 296, 399 P.2d. 909 (1965).

A lawyer's authority to disclose client information cannot be totally dependent on client consent. Instead, in a matter such as the instant inquiry presents, authority to disclose arises from the professional responsibility to perform that which is necessary and appropriate to enhance the client's legal position. For instance, a lawyer is authorized to disclose confidential client information in pleadings. Similarly, negative confidential information may be developed at trial by the lawyer to preclude its more damaging presentation by the adverse party. These disclosures would be within the purview of traditional legal representation. Moreover, the performance of the attorney herself must be both competent and diligent to ensure the effective assistance of counsel. If a matter is prematurely set for trial, the defendant's constitutional right to due process could be prejudiced.

It is within the contemplation of organized judicial procedures that the parties must also provide accurate and reliable information to the court about trial procedures. See, ER 3.3; Opinion Nos. 93-10 (July 20, 1993), 95-02 (February 1, 1995).

CONCLUSION

The superior court adopted a pre-trial status reporting form for criminal cases. The form inquiries are directed at determining the status of case preparation of the criminal matter. Parties to any civil or criminal matter may be subjected to a pre-trial status assessment to facilitate the proper and efficient administration of justice. The circumstances involved are not encompassed within the general ethical restriction on disclosure of confidential client information. Compliance with the status reporting would be ethically envisioned as making disclosures impliedly authorized to carry out legal representation in accordance with ER 1.6(a).

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State Bar of Arizona Ethics Opinions

95-02: Confidentiality; Disclosure of Client Whereabouts 2/1995

An attorney asked by a court about the availability of the client for trial must maintain the confidentiality of all information relating to the representation. However, counsel may disclose the intention of a client not to appear only if: (1) the attorney has actual knowledge that the client will not appear; and (2) the act is willful and not the result of mistake or inadvertence. [ERs 1.2, 1.6, 3.3]

FACTS

A municipal public defender's office requests that the Committee provide an opinion concerning the propriety of responding to a court inquiry of defense counsel about recent contact with a client and whether one's client is anticipated to appear for trial.

The court calls cases for trial throughout the day and assigns them to particular courtrooms. Apparently, the judge who monitors the assignment of cases will often inquire of the court-appointed counsel about the availability of the defendant or whether counsel has had any recent contact with him or her. The court does this to avoid having the case assigned to a courtroom only to result in the issuance of a bench warrant for a defendant when he or she fails to appear at the time of trial. Clients are not generally present throughout the day and only appear after an assignment to a courtroom has been made. Also, it does not appear that the Court conducts trials in absentia on a regular basis.

Some of the court appointed counsel believe that they cannot disclose information concerning their contacts with the client because of the confidentiality provisions of ER 1.6. Other court appointed counsel believe that their duty of candor to the court under ER 3.3 requires disclosure of such information.

QUESTION PRESENTED

Is a criminal defense lawyer required to provide information concerning contacts and whereabouts of the client upon the request of court personnel?

RELEVANT ETHICAL RULES

ER 1.2 Scope of Representation

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

ER 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c) and (d) or ER 3.3 (a)(2).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal the intention of his client to commit a crime and the information necessary to prevent the crime.

ER 3.3 Candor toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) except as required by applicable law, fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

* * * *

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by ER 1.6.

OPINION

The problem of what information a criminal defense lawyer must provide about a client who fails to appear for trial has vexed lawyers and bar committees for many years. For example, the formal opinions of the ABA have vacillated on this issue. In Formal Op. 155, the ABA Committee on Professional Ethics held that a lawyer "must not refuse to disclose" the whereabouts of his client who had jumped bail. Ethics and Grievances, Formal Op. 155, (May 4, 1936). Formal Op. 156 reached the same result in the case of a lawyer whose client had violated the terms of his parole. ABA Comm. on Prof. Ethics and Grievances, Formal Op. 156, (May 4, 1936). Both of these opinions contradicted Formal Op. 23 (1930), which prohibited disclosure in similar circumstances. ABA Comm. on Prof. Ethics and Grievances, Formal Op. 130, (March 15, 1935). Finally, in Formal Op. 84-349, the Committee withdrew both Op. 155 and 156 as "inconsistent" with the Model Rules. ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 84-349, Laws. Man. Supra p. 801-120 (May 7, 1984).

Generally, ER 1.6 (a) prohibits a lawyer from revealing any information "relating to the representation" unless the client consents after consultation. As this Committee has previously stated "ER 1.6 (a) is much broader than the legal attorney client privilege". Az. Op. 92-2 (March 12, 1992) at page 2. "The confidentiality rule applies not merely to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source." ER 1.6, Comment. Clearly, information obtained concerning the client's whereabouts and the attorneys last contacts with the client are "information relating to the representation" that must be kept confidential. Indeed, the rule of confidentiality is generally thought to prohibit a lawyer from revealing information concerning the whereabouts of his client. See, Geoffrey C. Hazard Jr. & W. William Hodes, The Law of Lawyering at Section 1.6:113 at page 148 (1992). See also, Az. Op. 92-2 (communication from client to lawyer that client is using false name presumptively confidential)[1]

The problem presented here, however, is slightly different. It is not what information a lawyer can be required to disclose concerning a client after failure to appear, but rather what information that lawyer must disclose prior to the appearance. In one jurisdiction that has an exceedingly broad exception to lawyer confidentiality and requires lawyers to volunteer information to prevent a client from committing any crime, the bar ethics committee concluded that lawyers are not required to notify the court "so long as there remains any possibility that counsel may be able to effect a court appearance by a client. . ." See Florida Bar Op. 90-1 Laws. Man on Prof. Conduct (ABA/BNA) p. 901:2509 (July 15, 1990)(emphasis in original). This opinion is based on the practical realities of criminal practice in which defendants often make statements that they will not show up which they really do not mean:

> Criminal defendants when talking with their lawyers (in the attorney's office or by telephone, and especially when clients call from out of state or out of the country) often think out loud about skipping out, or come right out and say they plan not to show up for court again; and yet, a great majority of these cases, when the time comes, they do show up for court, in spite of what they have said. One may assume they show up based at least in part on the urging of their lawyers in response to what they said. But, regardless the reasons why they usually show up for court, it is a result that would not be obtained if lawyers, upon hearing clients say they are going to skip future court appearance, were required to immediately tell the court what their clients have just said in that regard. Such conduct by counsel would quickly destroy the attorney-client relationship, and it would be doing so in situations that, in reality, most often do not turn

> out to be a problem--which would serve the interest of neither the clients nor the administration of justice.

Id.

The ethics committee in that jurisdiction only required notice to the court of the situation when the lawyer knows "with reasonable certainty" that the client's avoidance of the court authority is willful and is, "for all practical purposes, an irreversible fact." Id. See also United States v. Del Carpio-Cotrina, 733 F. Supp. 95 S.D. Fla. 1990) (actual knowledge that defendant will fail to appear is required before notification to the court).

In Arizona, ER 1.6 (b) only requires disclosure of confidential information to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm. Neither are likely in this situation. The only consequence of the lawyer's maintenance of confidentiality would be the failure of the client to appear for trial as ordered. ER 1.6 (c) gives a lawyer discretion to reveal the intention of a client to commit such a crime, but does not require it. As the Comment to this section demonstrates, it will be a rare case when the lawyer is sufficiently certain of the client's intention that he or she would reveal it. "It is very difficult for a lawyer to 'know' when such unlawful purpose will actually be carried out, for the client may have a change of mind." ER 1.6, Comment. If there is any possibility that the client would appear for trial, then the lawyer should try to persuade the client to do so rather than revealing confidential information to the court that the client intends not to appear.

Of course, the duty of candor to the tribunal under ER 3.3 also has to be considered. Clearly, counsel are prohibited from making any false statements to the court regarding the availability of the client. More importantly, counsel may not fail to disclose a material fact to the court "when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." ER 3.3(a)(2). The duties stated in ER 3.3 supersede the duty of confidentiality under ER 1.6.

The most common example of the lawyer's duty to refrain from assisting the client in a criminal act is the client's intention to commit perjury. See Op. 92-2 (March 12, 1992). Maintaining confidentiality of privileged information does not "assist" the client in failing to appear for trial in the same manner that a lawyer elicits perjured testimony from a defendant at trial. Whether

the offense of failure to appear in Arizona is a "continuing crime" such that the lawyer's silence alone may assist it is beyond the scope of this opinion. See A.R.S. §§ 13-2506; 13- 2507.

If counsel has actual knowledge that the client will not appear for trial, and the client's failure to appear is willful and not due to mistake or inadvertence, then counsel may be ethically obliged to advise the court of the situation if so questioned. Of course, counsel is always permitted to disclose non-privileged information that may be helpful to the court. Indeed, in this area counsel frequently will report to the court on accidents or illness that may delay a client's appearance. But if other information is protected by the duty of confidentiality, counsel will have to tell the court that any additional information is privileged and let the court make such further inquiry or rulings as the court deems appropriate.[2]

CONCLUSION

Based on the facts submitted by the inquiring attorney, a lawyer questioned by the court concerning the availability of his or her client for trial must maintain the confidentiality of all "information relating to the representation". Counsel may disclose the intention of the client not to appear, but only if he or she has actual knowledge that the client will do so and the act is willful and not the result of mistake or inadvertence. Counsel would have a duty not to mislead the tribunal concerning the defendant's availability and may be required to notify the court in response to the court's questions if he or she has actual knowledge that the client will fail to appear. Before disclosing privileged information counsel must invoke the privilege.

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[1] A lawyer, of course, may be "forced" by other law to reveal such information. See, Hazard & Hodes, The Law of Lawyering, supra. Such forced disclosure occurs in this situation when the law of the jurisdiction makes the crime of failure to appear a continuing offense so

that the lawyer's silence may be said to facilitate the crime. See Commonwealth v. Maguigan, 511 Pa. 112, 511 A.2d 1327 (1986) (Attorney must disclose client's whereabouts when client is out on bail); In re Marriage of Decker, 606 N.E.2d 1094 (Ill. 1992). In such a situation the lawyer would be required to invoke the privilege to any questioning, but if the privilege was overruled by "other law", there would be a "forced" disclosure.

[2] If the lawyer, after asserting the privilege, is ordered by the court to reveal all information about the client's whereabouts, this would create a so-called "forced" exception to the rule of confidentiality. See n.2, supra.

State Bar of Arizona Ethics Opinions

90-02: Dealing with Unrepresented Person; Respect for Rights of Third Persons

3/1990

Propriety of surreptitiously recording interviews of potential witness in a criminal case.

FACTS

The retained investigator for the public defender service in county X wishes to tape record an interview with a potential witness in a criminal case without the knowledge of that witness. The purpose of this surreptitious tape recording is to obtain impeachment material on the witness should the testimony of the witness be different at the trial than in the interview.

QUESTION

Is it ethically proper for an attorney or the attorney's agents at his or her direction to surreptitiously tape record interviews of potential witnesses in a criminal case?

ETHICAL RULES CITED

Arizona Rules of Professional Conduct, Supreme Court Rule 42, 17A A.R.S.:

ER 3.1. Meritorious Claims and Contentions

... A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

ER 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by ER 1.6.

ER 4.3. Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

ER 4.4. Respect for Rights of Third Persons

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

ER 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

*****

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

*****

RELEVANT PRIOR OPINIONS

1. Opinion No. 176A, dated September 21, 1965 – One attorney should not record surreptitiously a telephone conversation with another attorney to be later played back to his client.

2. Opinion No. 74-18, dated August 6, 1974 An attorney may not surreptitiously record a conversation with a witness, potential witness or potential adverse party. (Vacated by Opinion No. 75-13 of June 11, 1975.)

3. Opinion No. 74-35, dated November 5, 1974 – The committee opined, following its Opinion No. 74-18, that a county attorney or deputy county attorney cannot ethically cause or encourage police or other investigators to surreptitiously tape record a conversation with a witness or potential defendant. (Vacated by Opinion No. 75-13 of June 11, 1975).

4. Opinion No. 75-13, dated June 11, 1975 - The committee opined, modifying and vacating its Opinions Nos. 74-18 and 74-35, that the previous absolute prohibition against surreptitious tape recording should be subject to four exceptions permitting a lawyer to secretly record:

(a) "an utterance that is itself a crime, such as an offer of a bribe, a threat, an attempt to extort or an obscene telephone call";

(b) "...a conversation in order to protect himself, or his client, from harm that would result from perjured testimony. In this category, however, it is important to note that the purpose of the secret recording is solely to provide a shield for the lawyer, or his client, and that this exception does not authorize secret recordings for the purpose of obtaining impeachment evidence or inconsistent statements.";

(c) "conversations with informants and/or persons under investigation simply as a matter of self-protection."; and

(d) conversations, etc., "where specifically authorized by statute, court rule or court order."

OPINION

The use of surreptitious tape recording by attorneys in Arizona is a question of interest to all criminal law practitioners, given the present realities of law enforcement practices. Unless the right to privacy restricts all surreptitious recording, the use of such devices should not be forbidden to the criminal defense bar.

Within Arizona (contrary to the law in some other jurisdictions), there appears to be no state or local prohibition against surreptitiously recording conversations where one party to that conversation agrees to such recording. A.R.S. S 13-3005(A) (2). Under federal law, surreptitious recording of conversations with one party consenting is also legal (18 U.S.C. § 2510 et seq.), although a long-standing Federal Communications Commission regulation forbids such recordings unless adequate notice is given to all parties by the use of an automatic tone warning device. Taped conversations obtained in violation of this FCC regulation have been held not to prohibit the introduction of such tapes. Battaglia v. United States, 349 F. 2d 556, 559 (9th Cir. 1965), cert. denied, 382 U.S. 955 (1965). The surreptitious recording of conversation appears to be legal in relation to in-person and telephonic conversations. Additionally, there is no question that both parties in a criminal case are entitled to

interview potential witnesses. Rule 15, Arizona Rules of Criminal Procedure. For these reasons, the "legal rights" of a third person would not appear to be violated by surreptitiously tape recording an interview of a witness.

The prior Arizona ethics decisions on this subject matter were based on the Ethical Considerations and Disciplinary Rules in effect in this state prior to the substantial revisions made by Arizona Supreme Court Order on September 7, 1984, effective February 1, 1985. These provisions – DR 1-102 (A) (4) (prohibition against engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) and Canon 9 (avoidance of even the appearance of professional impropriety) -- can no longer provide the basis for prohibiting surreptitious recording of interviews. The ethical admonition to avoid the appearance of impropriety no longer is specifically included in the 1985 Rules. Although the pre-1985 Disciplinary Rule 1-102(A) (4) is substantially continued in Ethical Rule 8.4(c), the addition of new Ethical Rule 4.4 that a lawyer shall not use "methods of obtaining evidence that violate the legal rights" of third persons seems, by implication, to allow the legal surreptitious recordation of statements of witnesses. C. Wolfram, Modern Legal Ethics, Section 12.4.4, pp. 649-650 (1986).

The practicalities of the present day criminal justice system seem to be inconsistent with any continued prohibition against surreptitious recordation of a witness. More specifically, it is common practice for law enforcement agencies to surreptitiously record interviews and/or conversations in criminal investigations. The committee believes that a serious imbalance would be created by permitting law enforcement attorneys and their agents to use this device without allowing defense attorneys to do the same. Indeed, at least one court has found that this disparity constitutes an impermissible denial of equal protection of the law. Kirk v. State, 526 So. 2d 223, 227 (La. 1988). Additionally, ethics committees in other states which have recently considered this problem have concurred that fairness and the Sixth Amendment to the United States Constitution allow defense attorneys or their agents to surreptitiously tape record witnesses to the same extent accorded law enforcement personnel. See, Kentucky Opinion E-279, January, 1984; Tennessee Ethics Opinion 86-F-14(a), July 18, 1986.

It is also very common for both parties in a criminal proceeding to have an investigator or other third party present during interviews for the sole or substantial purpose of enabling the third person to testify to the substance of the conversations should the subject of the interview testify inconsistently. Obtaining the presence of an investigator or other third person at interviews to act as an impeachment witness at trial is an encouraged practice. During the interview, there is no requirement that the witness be warned of possible incrimination, the need for counsel, or notice that the investigator/third person may testify as an impeachment witness at trial should the witness testify inconsistently.[1]

Section 4-4.3 Relations with Prospective Witnesses

*****

"b) It is not necessary for the lawyer or the lawyer's investigator, in interviewing a prospective witness,

to caution the witness concerning possible self-incrimination and the need for counsel.

*****

"d) Unless the lawyer for the accused is prepared to forego impeachment of a witness by the lawyer's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, the lawyer should avoid interviewing a prospective witness except in the presence of a third person."

The ABA standards have not yet been adopted or approved by the Arizona Supreme Court, but we find them persuasive on this issue.

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[1]The ABA Standards relating to the Administration of Criminal Justice (Second Edition), states, in pertinent part:

There is a distinction between investigator interviews and surreptitious taping in that, in the former case, the person being interviewed is more likely to infer that what he is saying to the investigator may be taken down for later use. However, the practical considerations in favor of taping, whether by the attorney or his investigator, lie in the greater accuracy of this method.

Considering the Rules of Professional Conduct currently in effect and the realities of present day practices, we must broaden the sentiment expressed in our prior Opinion No. 75-13 that an ethical prohibition against the surreptitious recording of witness interviews in a legal manner cannot be established as a blanket rule. That opinion sought to limit surreptitious recordation to "rare cases where the attorney has first satisfied himself that there are compelling facts and circumstances justifying the use of a secret recording". While we agree that it is a worthy practice to protect the privacy rights of Arizona citizens by prohibiting surreptitious recording, or limiting surreptitious recording of witnesses to instances where there are compelling circumstances that is a matter which more properly must be addressed by the Arizona legislature or the Arizona Supreme Court in its interpretation of the Arizona Constitution. If there are no legal restrictions against one-party consensual recording, and law enforcement agents are additionally allowed to engage in such activities, then the criminal defense lawyer, in fulfilling his or her legal and ethical duties to zealously represent a client, must equally be permitted to develop important impeachment evidence through this method. The importance of preventing persons from twisting the truth may, depending on the circumstances, be necessary to the effective representation of a criminally accused client. Therefore,

the distinction drawn in our Opinion No. 75-13 between surreptitious recording to protect against perjury (which the opinion permitted) and surreptitious recording for impeachment purposes (which the opinion prohibited) does not appear to have any basis in the present Rules of Professional Conduct. The result of our present opinion seems in perfect accord with our Opinion No. 75-13 because a surreptitious recording would ordinarily be used only when the witness, under oath, makes a statement contrary to the tape-recorded testimony, in possible violation of the perjury and/or false swearing statutes. See, A.R.S. 5 § 13-2702 et seq.

Accordingly, we conclude that the recording of witness conversations by criminal defense attorneys or their agents, with the consent of only one party to the conversation, may be ethically permissible either for the purpose of protecting against perjury or for the purpose of obtaining impeachment material should the testimony of the witness be different at trial.

State Bar of Arizona Ethics Opinions

87-14: Fairness to Opposing Party and Counsel; Impartiality and Decorum of the Tribunal

7/1987

Attorney citing to a trial court a memorandum decision of the Arizona Supreme Court of Arizona Court of Appeals that is not precedent, but for persuasive value only.

FACTS AND QUESTIONS

Inquiring attorney seeks an opinion as to the ethical propriety of

a) Citing to a trial court in Arizona a memorandum decision of the Arizona Supreme Court or Arizona Court of Appeals, other than for the purpose of establishing res judicata, collateral estoppel or the law of the case, if he makes clear in his brief and argument that the memorandum decision is not precedent and is cited for its persuasive value only; and

b) Citing a decision of the Superior Court in his jurisdiction (sitting as a reviewing court in a special action or a lower court appeal), again solely and expressly for its persuasive value.

ETHICAL RULES INVOLVED

ER 3.4. Fairness to Opposing Pasty and Counsel

A lawyer shall not:

*****

c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

*****

ER 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or an official of a tribunal by means

prohibited by law;

*****

OPINION

In our Opinion No. 78-4, we addressed the issue posed by this inquiry. The rule under discussion in that opinion has now become Rule 111(c) of the Rules of the Arizona Supreme Court ["Rule 111(c)"] and Rule 28(c) of the Arizona Rules ofCivil Appellate Procedure ["Rule 28(c)"]. There has been no change in the language of the rule, however. The current rules provide:

> Memoranda decisions shall not be regarded as precedent nor cited in any court except for the purpose of establishing the defense of res judicata, collateral estoppel or the law of the case.

Effective February 1, 1985, the Supreme Court of Arizona discarded the Code of Professional Responsibility, under which Opinion No. 78-4 was decided, and adopted the Rules of professional Conduct ("Rules"). Although the adoption of the Rules effected substantive changes in many areas of ethical responsibility of lawyers, in our opinion no substantive change in the area under inquiry here was effected by adoption of the Rules.

For purposes of this discussion, ER 3.4(c) is virtually the same as DR 7-106(A) of the Code of Professional Responsibility. For purposes of this discussion, ER 3.5(a) imposes similar ethical obligations as DR 7-106(C) (7). The committee therefore reaches the same conclusion as to Question a) as it did in Opinion No. 78-4. Insofar as the citation contemplated would be of a "memorandum decision" as defined in Rules 111(c) and 28(c), such a citation would disregard a rule of the Supreme Court, would appear to be seeking to influence a judge by means prohibited by law, and would therefore be unethical.

There does not, on the face of either Rule 28(c) or Rule 111(c), appear to be any prohibition against citing to another court a decision of the Superior Court in a special action or in a lower court appeal. There does not appear to be any rule in the Superior Court Rules of Appellate Procedure that would make either Rule 111(c), Roles of the Arizona Supreme court, or Rule 28(c), Arizona Rules of Civil Appellate Procedure, applicable to opinions of the Superior Court sitting on a lower court appeal or which would prohibit such citation. On the other hand, Rule 9 of the Rules of Procedure for Special Actions make the Arizona Rules of Civil Appellate Procedure applicable to special actions. Therefore, perhaps the argument could be made that Rule 28 (c) would prohibit the citation of a memorandum decision of the Superior Court deciding a special action. The committee is of the opinion, however, that Rule 28, by its title, indicates that it was not intended to be applicable to any court other than the Supreme Court or Courts of Appeals. Moreover, the terms of the Rule indicate inapplicability to a situation where only one judge, such as a Superior Court judge, is rendering a decision. The committee therefore finds no ethical impropriety in the citation to a decision of the Superior Court regarding the disposition of a special action or a lower court appeal.

We accordingly conclude that the proposed conduct set forth in question a) would be unethical, but that the proposed conduct set forth in question b) would not be unethical.

State Bar of Arizona Ethics Opinions

90-13: Reporting Professional Misconduct 10/1990

Thorough analysis of the scope of an attorney's ethical duty to report another attorney's misconduct.

FACTS

On September 22, 1988, the Supreme Court of Illinois issued its opinion in an attorney disciplinary proceeding, In re Himmel, 125 Ill.2d 531, 127 Ill. Dec. 708, 533 N.E.2d 790 (1988), suspending attorney Himmel for one year for failure to report another attorney's misconduct to appropriate state bar authorities. This controversial opinion focused renewed nationwide attention on the duty members of the bar have to report their colleagues' misconduct, colloquially if impolitely referred to as the "squeal rule." As elsewhere, Himmel has provoked considerable discussion and uncertainty in Arizona as to its application and effect.[1] This committee has been receiving an increasing number of requests from attorneys as to the parameters of their duty to report another lawyer's apparent misconduct. In order to provide some uniform general guidance to our members, supplementing that in our recent Opinion No. 89-06 (July 16, 1989), the committee is issuing this formal opinion on three specific requests as to the reporting obligation in Arizona.

First Request

The first request presents the case of a plaintiff's attorney who believes that his opposing counsel in a pending litigation has submitted inconsistent affidavits regarding his failure to file a timely answer to the complaint. In the first affidavit filed with the Superior Court, defendants' counsel stated that he "signed a final draft" of the answer on October 24 but did not file it because he was awaiting information from the Arizona Corporation commission to verify defendants' status, which plaintiff had alleged to be defunct. Since that information was received too late on October 25 to file the answer, it was filed on October 26. In a subsequent affidavit attached to a petition for special action to the Court of Appeals about six weeks later, however, this attorney wrote that he "finalized and signed" the answer on October 24 and gave it to the secretary having responsibility "to insure that completed and signed pleadings are timely filed." This secretary had the duty "to make the proper arrangements for filing of the pleading." This second affidavit apparently does not refer to the need on October 24 to

await further information. The inquiring attorney states that he has been unable to "reconcile the apparent inconsistencies" in the two affidavits, and suggests that the second one was filed "apparently in an attempt to demonstrate excusable neglect."

Second Request

In the second request, the inquiring attorney represents lawyer X who, in turn, represents a client in a legal proceeding of undetermined nature, although the inquiring attorney discloses that lawyer X has an active administrative law practice. The client has informed lawyer X, in a communication subject to the attorney-client privilege that she was raped by her former lawyer and is pregnant as a result of the rape. Her psychiatrist has advised her that it would be harmful to reveal the name of the man who raped her. The client has specifically and categorically instructed lawyer X that he is not to report the matter to the State Bar or to any law enforcement agency. Lawyer X has no knowledge or information regarding the former lawyer, and has no reason to believe that the former lawyer may similarly harm other clients.

Third Request

The third request comes from five attorneys. Since 1987, attorneys A and B have been the sole shareholders in a professional corporation which employs the other three attorneys as associates under their agreement, A and B were to take equal draws from the firm and split profits and losses equally. The firm also employs B's wife as the office manager with responsibility for overseeing the firm's bookkeeper and maintaining its financial records.

It has been discovered that, from about May to October, 1989, attorney B was taking from the firm fees which were paid in cash without crediting the cash in the firm's accounts. Either attorney B or his wife would destroy the firm's receipt book to cover up the cash transactions. When confronted, attorney B and his wife admitted this conduct in a meeting attended by all five attorneys and estimated the amount of cash involved as between $5,000 and $10,000. They justified their actions by saying that, for various reasons, attorney B was contributing more to the firm than attorney A. Attorney B stated that there was no improper handling or diversion of clients' trust monies, and the firm's outside accountant "tentatively" has confirmed this.

All five attorneys ask whether there is an obligation to report attorney B's conduct. They also ask whether this obligation is affected by attorney A's decision on the question of whether or not to file criminal charges against attorney B; or by B's commitment to report the income as a distribution of profit and to pay the appropriate income taxes thereon; or by A's and B's ability or inability to work out a pending proposal for B's purchase of A's interest in the firm, the terms of which may take into consideration the money taken by B.

QUESTION

In each of the described circumstances, does any attorney[2] have a duty to report the possible misconduct by another member of the bar to the office of Chief Bar Counsel for the State Bar?[3]

We wish to make clear at the outset, however, that this Opinion deals only with an attorney's obligation under the Arizona Rules of Professional Conduct to report another lawyer's misconduct in the sense that one is subject to discipline for failure to report. There well may be other situations in which a lawyer, not constrained by confidentiality or other requirements as discussed below, can -- and in a normative but non-obligatory sense should -- report another lawyer's misconduct.

ETHICAL RULES CITED

ER's 1.1, 1.3, 1.6, 1.9, 3.3, 3.4, 8.3, 8.4.

RELEVANT PRIOR ARIZONA OPINIONS

Opinion No. 84-18 (December 31, 1984)

Opinion No. 87-3 (January 27, 1987)

Opinion No. 87-22 (September 18, 1987)

Opinion No. 87-26 (December 30, 1987)

Opinion No. 88-08 (October 24, 1988)

Opinion No. 89-06 (July 16, 1989)

OPINION

The duty of members of the bar to report, in appropriate circumstances, apparent misconduct by fellow attorneys is an important aspect of the legal profession's relative autonomy and the concomitant "special responsibilities of self-government."

Rule 42, Rules of the Supreme Court, Rules of Professional conduct, Preamble-A Lawyer's Responsibilities, 17A A.R.S. at p. 327 (hereinafter "Ariz. Rules Prof. Conduct"). Lawyers often are in the best position to observe and evaluate misconduct by colleagues. Since the American Bar Association's first attempt, in 1908, to codify guidelines for professional conduct, it has endorsed at least a generic responsibility to report. See A.B.A. Canons of Professional Ethics, Canon 29 (1908)

("Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, ..."). See also Canon 28 (1908) (duty to report lawyer "[s]tirring up strife and litigation).

A duty to report, however, can easily breed a climate of suspicion and distrust and, if applied too literally and not tempered with reason and judgment,[4] is susceptible to trivialization and abuse.[5] It also has been difficult to enforce. Despite reporting requirements in both the A.B.A. Model Code of Professional Responsibility, DR 1-103(A) (1970), and A.B.A. Model Rules of Professional Conduct, Rule 8.3 (1983), upon which most states base their provisions, until recently there were virtually no reported instances of an attorney being disciplined simply for failure to report another lawyer. See 2 G. Hazard and W. Hodes, The Law of Lawyering (2d ed., 1990) § 8.3:101 at 939; R. Rotunda, Professional Responsibility (2d ed. 1988) 31, citing, inter alia, Note, The Lawyer's Duty to Report Professional Misconduct, 20 Ariz. L. Rev. 509-547 (1978), and a "rare example" of a case where a court severely reprimanded a lawyer for failing to report another lawyer's wrongdoing, Matter of Bonafield, 75 N.J. 490, 383 A.2d 1143 (1978) (per curiam). In this context, the Himmel case is significant and came as a considerable surprise to the bar.[6]

A. The Himmel Case

Himmel's client, Ms. Forsberg, had been represented by attorney Casey on a contingency basis to recover for her injuries in a motorcycle accident. Casey negotiated a settlement but then converted the funds. After two years of trying unsuccessfully to collect her share of the settlement proceeds, about $23,000.00, from Casey, Ms. Forsberg hired Himmel agreeing to pay him one third of whatever he recovered above that amount. Himmel conducted an investigation and discovered the conversion, but, instead of reporting it, drafted an agreement in which Casey would pay Ms. Forsberg $75,000.00 in settlement of any claim against the misappropriated funds, and in return for her agreement not to file any criminal or civil action, or any attorney disciplinary proceeding, against Casey.[7] Casey signed this agreement but then breached it, whereupon Himmel sued him and obtained a $100,000.00 judgment that went unsatisfied.

Himmel's efforts on behalf of Ms. Forsberg did net about $10,000.00 for her from Casey. Payment under either the settlement agreement or the judgment would have resulted in a fee for Himmel but, as it was, he never received anything pursuant to his agreement with Ms. Forsberg. Ms. Forsberg had told Himmel that all she wanted was her money back from Casey, and specifically instructed him to take no further action. There was some dispute as to whether Ms. Forsberg herself had notified the Illinois Attorney Registration and Disciplinary Committee about Casey, but the court considered this irrelevant because a client's complaint of another attorney's misconduct would not be a defense to her lawyer's failure to report the same misconduct. Himmel, 533 N.E.2d at 792-93.[8] The court similarly dismissed the notion that an attorney could circumvent ethical rules and fail to report another's misconduct simply because his client asks him to do so. Id. at 793.

Casey was suspended and subsequently disbarred for conversion of client funds and other conduct in matters unrelated to Ms. Forsberg's claim. The lawsuit Himmel filed against Casey provoked inquiry from the Committee and led to the conclusion, discussed below, that Himmel had possessed unprivileged knowledge of Casey's conversion of client funds (being illegal conduct involving moral turpitude) and had failed to report it as required by DR 1-103(A) in effect in Illinois. Himmel argued that he had no dishonest motive in failing to repost Casey, and was motivated by respect for his clients wishes,[9] rather than a desire for financial gain, as demonstrated by the fact that he received no fee for the small recovery he did effect for his client. The court, however, noted that Himmel's failure to report Casey as soon as he learned of his misconduct may have allowed Casey to subsequently convert other clients' funds,[10] and compounded Casey's crime by agreeing not to report him in return for the settlement. Himmel, 533 N.E.2d at 796. The court therefore suspended Himmel for one year even though the Committee's Hearing Board had recommended only a private reprimand and its Review Board had recommended dismissal of the entire matter.

B. Himmel in Arizona

As striking as the Himmel opinion is,[11] and as important as the principles it discusses are, its application in Arizona is limited by the significant differences in the Rules of Professional Conduct as adopted by our Supreme Court from the Model Code provisions in effect in Illinois.[12] The following discussion highlights the most important principles applicable here.

The Illinois disciplinary rule (Rule 1-103 (a)) under which Himmel was charged is substantially identical with DR 1-103(A) of the A.B.A. Model Code, reading:

> "(a) A lawyer possessing unprivileged knowledge of a violation of Rule 1-102 (a) (3) or (4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." Himmel, 533 N.E.2d at 793.

Rule 1-102 (a) (3) and (4) specifies attorney misconduct that is either illegal involving moral turpitude (a) (3) or involves "dishonesty, fraud, deceit, or misrepresentation" (a) (4). Id.

By contrast, in Arizona, ER 8.3 follows the A.B.A. Model Rules, reading in pertinent part:

> "(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority, except as otherwise provided in these rules or by law.
>
> *****
>
> "(c) This rule does not require disclosure of information otherwise protected by ER 1.6."

Thus, in Arizona, not every violation need be reported. Reporting is mandatory only for a violation of the Rules[13] that goes to another[14] lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects." The reporting lawyer must have knowledge of a violation that raises a substantial question in this regard. Finally, and perhaps most importantly, the duty to report is surpassed by the broad confidentiality provisions of ER 1.6. As the Comment to ER 8.3 states, "[t]his rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule." See also our Opinion No. 89-06 at 8 where we advocated "careful use" of the judgment suggested in this Comment.

1. Fitness as a Lawyer

Thus, ER 8.3 covers only those violations that impact directly on the integrity of an attorney as a member of the legal profession. This comports with ER 8.4's inclusion, under one category of professional misconduct, of only those criminal acts that "reflect [ ] adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." ER 8.4(b). As the Comment to ER 8.4 states, "[a]lthough a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice."[15]

For example, a single and apparently isolated instance of a conflict of interest under ER 1.9, or of negligently missing a filing date in possible violation of ER 1.1 and ER 1.3, might not be embraced within ER 8.3. See, e.g., Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Opinion 88-225 (undated), ABA/BNA Law. Man. Prof. Con., p. 901:7316 (isolated incident of lawyer missing statute of limitations filing deadline need not be reported). But, as the Comment to ER 8.3 makes clear, even such an apparently isolated violation "may indicate a pattern of misconduct that only a disciplinary investigation may uncover." Thus, if there are reasonable grounds to believe that the observed instance is indicative of a pattern of misconduct that reflects on the attorney's fitness as a lawyer, the balance should weigh in favor of reporting, especially if otherwise there is a realistic potential for future harm, and "the victim is unlikely to discover the offense." ER 8.3, Comment. See ER 8.4, Comment ("A pattern of repeated [criminal] offenses, even one (sic) of minor significance when considered separately, can indicate indifference to legal obligation."). See also Philadelphia Bar Association Professional Guidance Committee, Opinion 88-37 (Jan. 1989), 5 ABA/BNA Law. Man. Prof. Con. 68 (Mar. 15, 1989, issue) (as a general matter, it is not necessary for a lawyer to report every impermissible conflict of interest by opposing counsel but, when compounded with other misconduct, it all should be reported).

2. Substantial Question

This approach is supported by the Rules focus on whether a substantial question is raised as to the lawyer's fitness. "Substantial" here "refers to the seriousness of the possible offense and not the quantum of evidence of which the [reporting] lawyer is aware. " ER 8.3, Comment. In this context

"substantial" also "denotes a material matter of clear and weighty importance." Ariz. Rules Prof. Conduct, Preamble-Terminology, 17A A.R.S. at 329 (emphasis added). Thus, for example, subornation of perjury

(ER 3.3(c)) or destruction or alteration of documents (ER 3.4(a)) ordinarily would be both a serious and material offense, and would reflect adversely upon the offending lawyer's fitness to practice, so that reporting would be required. See our Opinion No. 87-26 (lawyer's acknowledged, and apparently repeated and willful, failures to file income tax returns, is almost certainly a reportable offense). See also Nassau County Bar Association Committee on Professional Ethics, Opinion 90-9 (Mar. 14, 1990), 6 ABA/BNA Law. Man. Prof. Con. 146-147 (May 23, 1990, issue) (lying to client about the pendency of an action is a reportable offense).

3. Knowledge

The knowledge of another lawyer's misconduct that will trigger a duty to report also entails a measure of judgment. See generally What Does A Lawyer Know? in 1 G. Hazard and W. Hodes, The Law of Lawyering (2d ed. 1990) §§ 400-404 at 1xxiv-lxxx.[16] Absolute certainty is not required, for such a standard effectively could nullify the duty. On the other hand, a charge of professional misconduct is a serious matter that should not be undertaken lightly. Mere rumor or suspicion should not be enough to mandate reporting. Bar Association of Greater Cleveland, Professional Ethics Committee, Opinion 85-1 (Mar. 29, 1985), ABA/BNA Law. Man. Prof. Con., p. 801:6952 ("suspicion" does not constitute "knowledge" under DR 1-103) , accord Alabama State Bar Disciplinary Commission, Opinion 85-95 (Sept. 18, 1985), ABA/BNA Law. Man. Prof. Con., p. 801:1107. See Rotunda, supra note 6 at 986. The court in Himmel quoted A.B.A. · Informal Opinion 1210 (1972) discussing the duty to report lawyer misconduct "directly observed in the legal practice or the administration of justice." Himmel, 533 N.E.2d at 793. The Rules are not limited to matters directly observed, but do indicate that "knowledge," as used in ER 8.3 (a), means "actual knowledge of the fact in question. N Ariz. Rules Prof. Conduct, Preamble-Terminology, 17A A.R.S. at 329. Yet, "[a] person's knowledge may be inferred from circumstances." Id.

We also note that the language used in ER 8.3 is "knowledge" and not merely "reasonable belief." The latter denotes, with some circularity, that "the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." Ariz. Rules Prof. Conduct, Preamble-Terminology, 17A A.R.S. at 329. The linguistic inference, therefore, is that the knowledge required to trigger a duty to report, whether direct or inferred from circumstances, must be something more than merely a reasonable belief. See 1 Hazard and Hodes, supra § 401 at lxxv-lxxvi. A familiar and useful comparison may be the requirement of Rule 11(a), Rules of Civil Procedure, 16 A.R.S. 1990 cum. pock. part at 11, that an attorney's signature on a pleading, motion or other paper constitutes a certificate by the signer that, to the best of the attorney's "knowledge, information and belief formed after reasonable inquiry it is well grounded in fact." Thus, a "bona fide belief" is sufficient for Rule 11 (a), State Bar Committee Note (1984 Amendment) to Rule 11(a) (16 A.R. S. at 104), but more is required to constitute knowledge under ER 8.3. To be under a duty to report, therefore, a lawyer would need more justification than that needed merely to file a civil action against the offending lawyer were

the offense actionable. See Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 1990-3, May 4, 1990, 6 ABA/BNA Law. Man. Prof. Con. 225-226 (July 18, 1990, issue) (full text at 3, n. 3).

Attorney Himmel presumably did not "directly observe" Casey's conversion of Ms. Forsberg's funds, but learned about it later in the course of investigating his client's claim against Casey. We agree that information learned in such an investigation, which well may be the way in which much attorney misconduct is discovered, can form the basis of a mandatory report so long as it rises to the level of "knowledge" as discussed herein. For example, the Alabama State Bar Disciplinary Commission, in its Opinion 89-53 (May 19, 1989), states that a lawyer has a duty to report under DR 1-103(A) if, after a "thorough investigation," he has a "definite and firm conviction" that another lawyer has violated a disciplinary rule. Merely a suspicion of an ethical violation is not sufficient to impose the duty (citing Alabama Opinion 85-95, supra). 5 ABA/BNA Law. Man. Prof. Con. 219-220 (July 19, 1989, issue).

Similarly, the Maine Board of Bar Overseers Professional Ethics Commission, in its Opinion 100 (Oct. 4, 1989), ruled that a lawyer who does not share his client's conviction that the client's former lawyer was guilty of fraud lacks the requisite knowledge to be obligated to report. 5 ABA/BNA Law. Man. Prof. Con. 378 (Nov. 22, 1989, issue). And the Philadelphia Bar Association Professional Guidance Committee, in its Opinion 90-7 (June, 1990), has ruled that an attorney who finds a tape recorded by another lawyer (a former member of the inquiring attorney's firm) dictating a letter to the local tax review board in which the dictating lawyer, in conversation presumably with the transcriber, states that statements he is making to excuse his failure to pay delinquent taxes are false, is not ethically obligated under Rule 8.3 to report the matter if he does not have actual knowledge that the letter was indeed sent. This is because, unless the inquiring attorney knows that the dictated letter actually was sent, he has only suspected – and no actual – knowledge of misconduct. If, however, the inquiring attorney "knows for a fact that the letter on the dictated tape was actually sent," then he does have a duty to report. 6 ABA/BNA Law. Man. Prof. Con. 226 (July 18, 1990, issue).

On the other hand, a New Mexico attorney received sworn statements from two employees of his client that opposing counsel had offered them a monetary reward to influence their testimony in an arbitration proceeding. State Bar of New Mexico Advisory Opinions Committee, Opinion 1988-8 (Aug. 1988), ABA/BNA Law. Man. Prof. Con. p. 901:6008. He had no other facts to support or refute the statements, nor any reason to question the credibility of the two witnesses. Adopting a "substantial basis standard" of what constitutes "knowledge" (under either DR 1-103 or ER 8.3) of an ethical violation by another lawyer, the Committee found that this was enough to raise the duty to report, at least in the sense of informing the authorities of the information, rather than making a statement that a violation has occurred. We concur that, ordinarily, two sworn statements may constitute sufficient knowledge. But, while the New Mexico Committee also stated that there was no need to confront the implicated attorney first, nor to investigate independently the existence of a violation, we believe that, in most circumstances, an appropriate level of independent investigation – perhaps including confrontation[17] - is preferable. By and large, however, we believe these Alabama, Maine, Philadelphia and New Mexico opinions represent a sound approach to articulating the knowledge requirement of ER 8.3(A).

4. Confidentiality

The most striking difference between Himmel and the situation in Arizona is the issue of confidentiality. DR 1-103(A) in Illinois encompassed all "unprivileged knowledge." The Illinois Supreme Court construed this expression to refer only to the attorney-client privilege in the evidentiary sense. This privilege did not apply because Himmel's client, Ms. Forsberg, discussed the matter with Himmel in the presence of others, and Himmel discussed Casey's conversion with third parties. Himmel, 533 N.E.2d at 794. Surprisingly, the court did not discuss whether the relevant information was "privileged" in the ethical sense as a "secret" to be preserved as confidential under DR 4-101, despite authority to this effect. See Rotunda, supra note 6 at 989-89.[18] See also ER 1.6, Comment, distinguishing the evidentiary and ethical principles. (Ariz. Rules Prof. Conduct, 17A A.R.S. at 345.)

In Arizona, under ER 1.6, without the client's consent after consultation, a lawyer may not reveal "information relating to representation of a client" except when impliedly authorized in order to carry out the representation or in a few specified circumstances. ER 1.6(a)[19] ER 8.3(c) explicitly provides that that Rule does not require disclosure of information otherwise protected by ER 1. 6.[20]

The confidentiality requirement of ER 1.6 is very broad. See generally, C. Wolfram, Modern Legal Ethics 296-302 (1986).

It applies not merely to matters communicated in confidence by the client but to all information relating to the representation, "whatever its source." ER 1.6, Comment. (Ariz. Rules Prof. Conduct, 17A A.R.S. at 345) The source, therefore, need not be the client. The information need not be embarrassing or likely to be detrimental to the client, as was the case for some "secrets" under Model Code DR 4-101 (A).

The duty of confidentiality continues after the client-lawyer relationship has terminated (ER 1.6, Comment, Ariz. Rules Prof. Conduct, 17A A.R.S. at 347), and encompasses information relating to the representation acquired before or even after the relationship existed. (ER 1.6, Code Comparison, id. at 348) Even if the information is shared with others and therefore not "privileged," it may still be a client confidence that the lawyer may not disclose.[21] There is a presumption against other provisions of law superseding ER 1.6 (ER 1.6, Comment), but see our Opinion No. 87-3 (discussing an attorney's duty to report receiving over $10,000.00 in cash from a client), and a client's instructions or special circumstances may limit any otherwise implied authorization to disclose. (ER 1.6, Comment) See our Opinion No. 87-22 (usual implied consent does not apply, under the circumstances presented, to attorney disclosing former client's name and present address).

Thus, in Arizona, Himmel might have been precluded from reporting what he learned about attorney Casey's conversion of Ms. Forsberg's funds, and therefore would not be subject to discipline for failure to report. Ms. Forsberg had specifically directed Himmel not to report Casey. She need not have had a good or even a rational reason for doing so.[22] See Wolfram, supra at 297 ("Nothing in the Code requires that a client's insistence on secrecy be reasonable."). Of course, if Himmel felt that the disclosure involved in reporting Casey would not have prejudiced Ms. Forsberg's interests substantially, then, under Arizona's Rules, he should have encouraged her to consent to disclosure. (ER 8.3, Comment; ER 1.6, Comment.) Absent such consent, however, he would be bound by the

requirement of confidentiality. Even after filing suit against Casey and thus making the conversion a matter of public record, it may not have been sufficiently generally known to relieve Himmel of the duty of confidentiality. See supra note 21; Rotunda, supra note 6, at 989.

Opinions from other jurisdictions confirm the limitation ER 1.6 imposes on the duty to report under ER 8.3. For example, in Maryland, a lawyer was not required to report a breach of fiduciary duty committed by his client's former lawyer that the client had specifically requested not be reported. Maryland State Bar Association Committee on Ethics, Opinion 89-46 (April 20, 1989), 5 ABA/BNA Law. Man. Prof. Con. 186 (June 21, 1989, issue). In Connecticut, an in-house corporate lawyer learned of possibly criminal misconduct by other corporate counsel, disclosure of which could be adverse to the corporation's interests. While the lawyer had several options, reporting the unprofessional conduct to the appropriate authorities under Rule 8.3 was precluded by the confidentiality requirements of Rule 1.6 if the inquiring lawyer does not choose the available option of disclosure, to legal counsel or an appropriate body such as the Ethics Committee, provided adequate steps are taken to protect the corporation's confidences and its vulnerability. This disclosure option was authorized in Connecticut's Rule 1.6(c) (a provision not included in A.B.A. Model Rule 1.6) whereby disclosure, to the extent necessary, was authorized "to prevent the company from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another." Connecticut Bar Association committee on Professional Ethics, Informal Opinion 89-14 (May 1, 1989), 5 ABA/BNA Law. Man. Prof. Con. 186-187 (June 21, 1989, issue). And, in Wisconsin, a lawyer's reporting of opposing counsels misconduct was foreclosed if it would entail revelation of any client information, whether or not such revelation would prejudice the client's interests. Wisconsin State Bar Committee on Professional Ethics, Formal Opinion E-89-12 (May 24, 1989), 5 ABA/BNA Law. Man. Prof. Con. 236-237 (Aug. 2, 1989, issue) (quoting Wolfram, supra at 685). But cf. Committee on Ethics of the Maryland State Bar Association, Opinion 89-36 (Feb. 14, 1989), ABA/BNA Law. Man. Prof. Con., p. 901:4323 (lawyer representing other lawyers must report their misconduct (if he has actual knowledge thereof) Which has already been revealed to a court and, therefore, is a matter of public record); Philadelphia Bar Association Professional Guidance Committee, Opinion 83-23 (June 28, 1988), 4 ABA/BNA Law Man. Prof. Con. 248 (Aug. 3, 1988, issue) (lawyer who receives communication directly from another party to a pending litigation alleging unethical conduct by that party's lawyer must report the information to the disciplinary board of the Pennsylvania Supreme Court. Confidentiality does not apply, as the information came from another party to the litigation, not from the lawyer's client.).

Even with these guiding principles, we emphasize again that a good measure of discretion and the "exercise of sensitive professional and moral judgment," as called for in the Preamble to the Rules (Ariz. Rules Prof. Conduct, Preamble-A Lawyer's responsibilities, 17A A.R.S. at 326), is necessary in applying ER 8.3 consistently with ER 1.6. See, generally, Judgement calls and Discretion in Lawyering, in Hazard and Hodes, The Law of Lawyering (2d ed., 1990), §§ 500-502 at 1xxi-1xxxiii. With this general background, we turn to a discussion of the specific inquiries before us.

First Inquiry

The first situation is difficult for us to resolve on the information provided. We have no difficulty with the proposition that an attorney's deliberate filing of a false affidavit with a court to excuse a late filing is a material matter raising a substantial question as to that lawyer's fitness. See ER 3.3 (a) (1). And, presumably, the inquiring attorney's client would consent to the reporting, eliminating any possibly troubling issue of confidentiality under ER 1.6.[23]

The requisite knowledge, however, is what we are unable to determine. The two affidavits of opposing counsel may be inconsistent and represent a deliberate attempt to mislead the court. On the other hand, counsel may simply be saying that he signed the answer on October 24, gave it to his secretary to await the receipt of the necessary information, and then to complete and file it, which she did on October 26. This may be what is meant by the statement that the secretary had the duty to "make the proper arrangements" for its filing. At this distance, and without more information, we are unable to determine whether the inquiring attorney has "knowledge" of another's misconduct in the sense discussed above. The inquiring attorney may be able to make this determination, or he may need to investigate further, including, if appropriate, confronting opposing counsel.

This situation falls into what we believe to be a large gray area in the interpretation and application of ER 8.3 in which the duty to report depends upon a very fact-sensitive determination, and the exercise of appropriate professional judgment and discretion, in accordance with the principles we have discussed. In virtually all of such situations, the inquiring attorney will be in a much better position to make this determination than this committee. Indeed, we way be precluded from giving definitive answers to inquiries of this sort by our jurisdictional limitations which preclude our answering questions "involving solely the attorney's exercise of judgment or discretion. 1, Committee on Rules of Professional Conduct, Statement of Jurisdictional Policies, para. 6(d). We can state, however, that, in such situations which are not governed by confidentiality constraints, we believe that the reasonable exercise of such judgment and discretion, one way or the other, should not be the subject of disciplinary investigation and action.

Second Inquiry

The second inquiry is easier to resolve. Again, we have no difficulty in finding that rape, a criminal act of violence, raises a substantial question as to the offending lawyer's fitness. See ER 8.4 (b) and Comment (distinguishing acts of violence from offenses concerning matters of personal morality such as adultery). (Ariz. Rules Prof. Conduct, 17A A.R.S. at 432-433) The knowledge element is more difficult, since all the knowledge the inquiring attorney possesses is his client's possibly self-serving allegation. If he were to make an ER 8.3 report, all he could say is that his client makes certain accusations, not that he has any personal information. More would seem to be required to raise a duty under ER 8.3. See our Opinion No. 88-08 at 9.

We need not decide this, however, because we are informed that the information is not only confidential but privileged, and that the client has instructed the attorney emphatically not to disclose it. Since we are told that lawyer X has a heavy administrative law practice, there is the suggestion that the information about the rape may not be germane to the subject matter of the representation. But,

we do not know this and it is not necessarily the case. Moreover, the information was gained in the course of the representation, is about the client, and therefore relates to the representation for purposes of ER 1.6(a). The client wishes the information kept confidential, and none of the exceptions to ER 1.6(a) apply. If the attorney believes that disclosure would not substantially prejudice the client's interests, he can encourage her not only to report her former attorney to the State Bar, but also to report the crime to the police. There may be additional redress with regard to the rape and pregnancy. But if, despite this urging, the client insists upon confidentiality, the inquiring attorney must respect the clients wishes, and thus there can be no duty to report under ER 8.3(a).

Third Inquiry

The third inquiry also is fairly easy to resolve. Attorney B's misappropriation of firm fees, and his alteration of the firm's books to conceal his acts, clearly raise a substantial question on a material matter that impacts his honesty, trustworthiness and fitness as a lawyer, and likely constitutes a breach of trust. Although questions of law are beyond our jurisdiction, Committee on Rules of Professional Conduct, Statement of Jurisdictional Policies, para. 6(a), we note that B's conduct may be a criminal offense whether characterized as theft, embezzlement or a false scheme or artifice to defraud. See ER 8.3(a), ER 8.4 (b). Even if not a criminal offense, it entails "fraud, deceit or misrepresentation." ER 8.4(c). The conduct did not consist of an isolated occurrence, but rather was a deliberate pattern or practice engaged in over many months. Attorney B and his wife have admitted their acts in the presence of all five attorneys, clearly establishing the requisite knowledge. There is no issue of attorney-client confidentiality. The other four attorneys therefore have a duty under ER 8.3 (a) to report attorney B, which can be fulfilled by a complete and accurate report by any one of them. See supra note 8.

This conclusion is in no way affected by attorney A's decision as to whether or not to cause criminal charges to be filed against attorney B; by attorney B's commitment to report appropriately and to pay tax upon the income as a distribution of profit; or by the result of A's and B's negotiation of a buy-out agreement. Such factors might be relevant in a disciplinary proceeding, but they do not affect a lawyer's duty to report under ER 8.3(a). Indeed, resolution of any such matters must remain independent of the mandatory report of attorney B's violation. See supra notes 7 and 17.

Editor's Notes

1. In addition to the opinions of ethics committees of other jurisdictions cited in the Opinion, see Opinion 638 of the New Jersey Supreme Court Advisory Committee on Professional Ethics, issued April 5, 1990, 6 ABA/BNA Lawyers Manual on Professional Conduct 167 (June 6, 1990, issue), the summary of which reads:

> "Lawyer need not report misconduct of another lawyer discovered while representing that lawyer, unless lawyer's misconduct is continuing in nature or lawyer is using legal representation to carry out his misconduct."

That Opinion cites the New Jersey cases of Fellerman v. Bradley, 99 N.J. 493, 493 A. 2d 1239, 1 Law. Man. Prof. Conduct 861 (N.J. Sup. Ct., June 27, 1985), and In re Nackson, 114 N.J. 527, 555 A.2 d 1101, 5 Law. Man. Prof. Conduct 115 (N.J. Sup. Ct., March 29, 1989), in support of the statement that, if the acts of dishonesty, untrustworthiness or unfitness of the lawyer-client were of a continuing character, or if the reporting lawyer's services were being used in furtherance of such activities by the lawyer-client, then "there would be a clear obligation [on the reporting lawyer] to divulge the information." (In fact, in neither of the two cases, was the client a lawyer, however.)

2. 2 Hazard & Modes, The Law of Lawyering (2d ed. 1990), § 8.3:101 at p. 939, note 2 states:

> "For a comprehensive but critical survey of disciplinary enforcement, including mandatory reporting on the misconduct of fellow lawyers, see Marks & Cathcart, Discipline Within the Legal Profession: Is It Self-Regulation?, 1974 U. Ill. L. Forum 193." [- 236]

Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings.

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[1] See, e.g., Corcoran, In re Himmel: Am I My Brother's Keeper?, Vol. 26, No. 2, Arizona Attorney 15 (Oct. 1989).

[2] Normally, the committee will not render an opinion involving the questioned ethical propriety of the conduct of any attorney other than the inquiring attorney. Committee on Rules of Professional Conduct, Statement of Jurisdictional Policies, para. 4. For purposes of responding to the second request, however, we will treat lawyer X as the inquiring attorney, since lawyer X is the attorney possessing information of another lawyer's misconduct that may trigger the reporting requirement. Lawyer X apparently has asked another attorney to present the inquiry to the committee to assure client confidentiality.

[3] In an appropriate case, this usually would be the preferred mechanism for reporting alleged attorney misconduct. See Rules 46 (g) (2), 49, and 53 (b) (1), Rules of the Supreme Court, 17A A.R.S. at 445, 451 and 464; ER 8.3, Comment.

[4] The discussion in our Opinion No. 89-06 (July 26, 1989) was meant to be "illustrative of problems we foresee in too rigid an application of principles enunciated by Himmel." Opinion No. 89-06 at 7.

[5] The potential for abuse is heightened by the absolute immunity conferred on complainants by Rule 54(1), Rules of the Supreme Court, 17A A.R.S. at 475, and Drummond v. Stahl, 127 Ariz. 122, 126, 618 P.2d 616, 620 (App. 1980) ("there is an absolute privilege extended to anyone who files a complaint with the State Bar alleging unethical conduct by an attorney."), cert. den., 450 U.S. 967, 101 S. Ct. 1484, 67 L. Ed. 2d 616 (1981). See R. H. Underwood and W. H. Fortune, Trial Ethics, § 20.2.3 at 560-62

(1988) on the abuse of the disciplinary process. See also Ariz. Rules Prof. Conduct, Preamble-Scope, 17A A.R.S. at 328 ("the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons.").

[6] In determining the appropriate quantum of discipline to impose on Himmel, the Illinois Supreme Court noted that Himmel also violated that state's criminal statute against compounding a crime by agreeing not to report the offending lawyer in exchange for a settlement agreement and funds from him. Himmel, 533 N.E.2d at 795-96. But the disciplinary proceeding was premised solely on Himmel's failure to report. Id. at 790-91. See Rotunda, The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel, 1988 U. Ill. L. Rev. 977, 984-85 n. 44.

[7] A portion of the $75,000.00 settlement might have represented "hush money" for Ms. Forsberg's silence. Alternatively, Himmel might have been justified in considering it compensation for Casey having settled her personal injury claim too cheaply. See Rotunda, supra note 6, at 983 n. 38.

Although questions of law are beyond our jurisdiction (Committee on Rules of Professional Conduct, Statement of Jurisdictional Policies, para. 6(a)), we note that, in Arizona, as the court in Himmel indicated for Illinois, such a settlement might constitute the offense of compounding under the Arizona Criminal Code, 5A A.R.S. § 13-2405. (Himmel, 533 N.E.2d at 796)

[8] We generally agree that simply the possibility that one's client already has reported the misconduct does not relieve the attorney from his or her duty to report, if otherwise required. On the other hand, however, there is no reason to foster a proliferation of cumulative reports. If an attorney is confident that a complete and accurate report of another attorney's misconduct already has been made to bar authorities sufficient to trigger an appropriate investigation under the circumstances, there is no reason to require an additional, superfluous report.

For example, an attorney in a law firm or other entity would not be excused from the duty imposed by ER 8.3(a), as discussed herein, to report misconduct by an attorney colleague. See our Opinion No. 84-18 at 4; Connecticut Bar Association Committee on Professional Ethics, Informal Opinion 89-21 (July 28, 1989), 5 ABA/BNA (Lawyer's Manual on Professional Conduct (hereinafter "Law. Man. Prof. Con.") 310 (Sept. 27, 1989, issue) (lawyer must report former partner's misconduct unless the reporting lawyer's Fifth Amendment rights apply). This duty would fall on any attorney in the firm or entity with the requisite knowledge. But, once one of the attorneys makes a complete and accurate report, this should satisfy the reporting duty of all of them. Again, a good measure of judgment should be applied, erring on the side of ensuring that all necessary information is reported.

[9] Not reporting Casey may have been in Ms. Forsberg's immediate best interests by maximizing her chances of recovering something from him. This apparently was her belief. See Burke, Where Does My Loyalty Lie? In re Himmel, 3 Georgetown Journal of Legal Ethics 643, 646 (1990). See infra note 22.

[10] One commentator, however, critical of the delay and inaction in many bar disciplinary proceedings, seriously questions whether earlier reporting of Casey would have had any meaningful effect. Rotunda, supra note 6 at 992-995.

[11] In a brief comment on the decision, Professor Hazard suggests that Rule 8.3(a) "has implications that need to be reconsidered. We might be better off if reporting a fellow attorney was much more broadly discretionary." Hazard, "Squeal Rule" Considered for Change, Nat'l L. J., Mar. 26, 1990, at 13, Col. 3, and 14, col. 4.

[12] In our Opinion No. 89-06 at 6 we commented that ER 8.3 "seems to require more incisive inquiry by the lawyer who detects misconduct by a colleague than does DR 1-103(A)", but we found "no practical substantive difference in the two provisions." That Opinion, however, in which, for stated reasons, we even declined to answer the specific questions posed, did not analyze the issues discussed here. See also our Opinion No. 84-18 at 4-5 indicating a significant difference between DR 1-103(A), then in effect, and ER 8.3(a), about to take effect; 2 G. Hazard and W. Hodes, The Law of Lawyering (2d ed. 1990) § 8.3:102 at 939 ("Rule 8.3 continues the traditional rule mandating reporting of a fellow lawyer's misconduct, but in a compromise formulation that defers to the difficulties of enforcement").

[13]ER 8.3 speaks of a "violation of the Rules." ER 8.4 sets forth various categories of professional misconduct, the first of which involves violations of the "rules." Since ER 8.4 itself is a "Rule," the other categories of misconduct specified there would also entail a duty to report if otherwise appropriate.

[14] Thus, a lawyer need not report his or her own misconduct, thereby eliminating any potentially troubling issues of self-incrimination. See Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Op. 1990-3, May 4, 1990, 6 ABA/BNA Law. Man. Prof. Con. 225-226 (July 18, 1990, issue) (discussing New York's recently amended DR 1-103 (A)).

[15] Conduct involving "dishonesty, fraud, deceit or misrepresentation," whether or not criminal, separately constitutes professional misconduct under ER 8.4(c).

[16] "The notion that lawyers can 'know' the reality of a situation goes against the grain of many lawyers' conception of themselves. Lawyers are trained in disbelief, or at least unbelief or suspended belief, and are required to act in that frame of mind in many of their professional duties." Id. at 1xxvii.

On the other hand, "[s]tudious ignorance of readily accessible facts is... the functional equivalent of knowledge." Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Op. 1990-3, May 4, 1990, 6 ABA/BNA Law. Man. Prof. Con. 225-226 (July 18, 1990, issue) (full text at 3 citing C. Wolfram, Modern Legal Ethics § 13.3.3, at 695-96 (1986) and adopting a standard for "knowledge" of: "a lawyer must be in possession of facts that clearly establish a violation").

[17] We note, however, that any suggestion or appearance of a threat to report, used as leverage to gain an advantage, must be avoided. See Maine Board of Bar Overseers Professional Ethics Commission, Opinion 100 (Oct. 4, 1989), 5 ABA/BNA Law. Man. Prof. Con. 378 (Nov. 22, 1989, issue); Nassau County Bar Association Committee on Professional Ethics, Opinion 90-9 (Mar. 14, 1990), 6 ABA/BNA Law. Man. Prof. Con. 146-147 (May 23, 1990, issue); Alabama State Bar Disciplinary Commission, Opinion 85-95 (Sept. 18, 1985), ABA/BNA Law. Man. Prof. Con., p. 801:1107. See also supra note 7.

[18] Apparently, this was not argued to the court until Himmel's unsuccessful petition for rehearing. Burke, supra note 9 at 644, note 19.

[19] These are: 1) where disclosure is mandatory in order to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm, ER 1.6(b); 2) where disclosure of the client's intention to commit a crime and of the information necessary to prevent the crime is permitted so as to prevent the client's commission of the crime, ER 1.6(c); 3) where disclosure is permitted to enable the lawyer to establish a claim or defense in any proceedings concerning the lawyer's representation of the client, ER 1.6 (d); and 4) where disclosure of a material fact to a tribunal is required when necessary to avoid assisting a criminal or fraudulent act by the client, ER 3.3(a) (2).

[20] We note that the "Scope" provisions of the Model Rules, as adopted in Arizona, omit the following paragraph:

> "The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure." (A.B.A. Model Rules of Professional Conduct, Preamble-Scope.)

We are reluctant, however, to read much into this omission, especially in the current context of the explicit exception to the reporting duty of ER 8.3(a) and (b) for information confidential under ER 1.6, created by ER 8.3(c).

[21] It is a close question as to when information relating to the representation of a client is sufficiently "generally known" as no longer to be confidential under ER 1.6. See ER 1.9(b). See also our Opinion No. 87-22 at 3 (the fact that information appears in a public record does not mean that it should not be regarded as confidential).

[22] Ms. Forsberg may have had very good reasons of self-interest for not wanting Casey reported. See Rotunda, supra note 6, at 988.

[23] The information is to some degree public in that it can be pieced together by comparison of the records of the two courts in which the arguably inconsistent affidavits were filed. Moreover, the information does not appear to be "about a client" (ER 1.6, Comment), and in that sense may not relate to the representation. We make no attempt to resolve this issue here.